

STORYTELLING AND THE LAW: A CASE STUDY OF *LOUTH v DIPROSE**

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[Legal storytelling is a relatively new addition to critical legal scholarship. This article draws on its insights and methodology, exploring the stories told and untold in legal discourse, with specific reference to the case of Louth v Diprose. The author links both the outcome of the case and the doctrinal development which it signalled, to the narratives deployed by the majority judges. It is contended that these narratives, as well as those of the judges in dissent, reflect and reinforce dominant ideas about gender and social class. The article concludes with a consideration of the strategies which might be employed by those who seek to include previously silenced voices in legal discourse.]

INTRODUCTION

[I]n some respect this is but one more case in the annals of human relationships in which an infatuated but unrequited suitor has lavished gifts upon the subject of his infatuation, well knowing what he was doing and intending to do it, but in a sense allowing his heart to rule his head.

Jacobs ACJ¹

To make sense of law and to organize experience, people often tell stories. And these stories are telling.

Kim Lane Scheppelle²

Legal storytelling poses a radical challenge to established ways of thinking and writing about the law. In recent years it has emerged as a powerful force in the legal academy.³ My aim in this article is to engage its insights in an exam-

* *Diprose v Louth (No 1)* (1990) 54 SASR 438 (King CJ); *Diprose v Louth (No 2)* (1990) 54 SASR 450 (Full Court); *Louth v Diprose* (1992) 175 CLR 621 (High Court). '*Louth v Diprose*' will be used when referring to the case generally.

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¹ *Diprose v Louth (No 2)* (1990) 54 SASR 450, 451-2.

² Kim Lane Scheppelle, 'Foreword: Telling Stories' (1989) 87 *Michigan Law Review* 2073, 2075.

³ Much of the literature has been published in law reviews. See, eg, Symposium, 'Legal Storytelling' (1989) 87 *Michigan Law Review* 2073 (11 articles stretching over 400 pages); Susan Estrich, 'Rape' (1986) 95 *Yale Law Journal* 1087; Martha Mahoney, 'Legal Images of Battered Women: Redefining the Issue of Separation' (1991) 90 *Michigan Law Review* 1; Mari Matsuda, 'Looking to the Bottom: Critical Legal Studies and Reparations' (1987) 22 *Harvard Civil Rights-Civil Liberties Law Review* 323 ('Looking to the Bottom'); Mari Matsuda, 'Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction' (1991) 100 *Yale Law Journal* 1329 ('Voices of America'); Robin West, 'The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory' (1987) 3 *Wisconsin Women's Law Journal* 81; Anthony Alfieri, 'Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative' (1991) 100 *Yale Law Journal* 2107; Jerome Culp Jr, 'Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy' (1991) 77 *Virginia Law Review* 539; Richard Delgado, 'When a Story Is Just a Story: Does Voice Really Matter?' (1990) 76 *Virginia Law*

ination of the recent case of *Louth v Diprose*.

Although there is a considerable degree of diversity amongst those engaged in 'legal storytelling', a number of themes can be identified in their work.⁴ Its adherents are drawn predominantly from the ranks of critical race and feminist scholars who emphasise the central role of narrative in legal analysis, that is, the stories told and untold in law, rather than its abstract rules and principles. Stylistically, they often use stories, parables, chronicles and dialogues as a means of persuasion in their work.⁵

The emphasis on narrative rather than 'facts' or 'rules' places legal storytelling in the context of that larger intellectual milieu, loosely referred to as post-modernism.⁶ This emphasis assumes the constructed and partial nature of facts and rules and problematises the distinction between them. The process of judicial adjudication is viewed not as the application of objective rules to objective facts, but as the adoption of a particular story in order to resolve a case.⁷

The stories adopted by judges and other legal decision makers are not, however, thought to be arbitrary. They are what Richard Delgado has called 'stock

Review 95 ('When a Story Is Just a Story'); Richard Delgado, 'Rodrigo's Chronicle' (1992) 101 *Yale Law Journal* 1357 ('Rodrigo's Chronicle'); Richard Delgado, 'Rodrigo's Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race' (1993) 81 *California Law Review* 387 ('Rodrigo's Third Chronicle'); Richard Delgado, 'Zero-Based Racial Politics and an Infinity-Based Response: Will Endless Talking Cure America's Racial Ills?' (1992) 80 *The Georgetown Law Journal* 1879 ('Zero-Based Racial Politics'); Richard Delgado and Jean Stefancic, 'Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?' (1992) 77 *Cornell Law Review* 1258 ('Images of the Outsider'); Richard Delgado and Jean Stefancic, 'Why Do We Tell the Same Stories?: Law Reform, Critical Librarianship, and the Triple Helix Dilemma' (1989) 42 *Stanford Law Review* 207 ('Why Do We Tell the Same Stories?'); Richard Delgado and Jean Stefancic, 'Norms and Narratives: Can Judges Avoid Serious Moral Error?' (1991) 69 *Texas Law Review* 1929 ('Norms and Narratives'); Milner Ball, 'The Legal Academy and Minority Scholars' (1990) 103 *Harvard Law Review* 1855; Marc Fajer, 'Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men' (1992) 46 *University of Miami Law Review* 511; Gerald López, 'The Work We Know So Little About' (1989) 42 *Stanford Law Review* 1. A considerable number of books whose authors utilise legal storytelling have also been published. See, eg, Derrick Bell, *And We Are Not Saved* (1987); Derrick Bell, *Faces At The Bottom of the Well* (1992); Patricia Williams, *The Alchemy of Race and Rights* (1991). A number of overviews and critiques of the literature have also been published. See, eg, Daniel Farber and Suzanna Sherry, 'Telling Stories Out of School: An Essay on Legal Narratives' (1993) 45 *Stanford Law Review* 807; Mark Tushnet, 'The Degradation of Constitutional Discourse' (1992) 81 *The Georgetown Law Journal* 251; Kathryn Abrams, 'Hearing the Call of Stories' (1991) 79 *California Law Review* 971; Mary Coombs, 'Outsider Scholarship: The Law Review Stories' (1992) 63 *University of Colorado Law Review* 683.

⁴ All of these themes are not necessarily represented in each of the works within this genre. Moreover, those engaged in legal storytelling do not confine themselves to this form of scholarship, but also engage in other forms of legal scholarship.

⁵ See, eg, Bell, *And We Are Not Saved*, above n 3; Bell, *Faces At The Bottom of the Well*, above n 3; Mahoney, above n 3; Delgado, 'Rodrigo's Chronicle', above n 3; Delgado, 'Rodrigo's Third Chronicle', above n 3; Williams, above n 3.

⁶ A recent concise and accessible introduction to various elements of this milieu in a 'legal theory' context is Margaret Davies, *Asking the Law Question* (1994) 212-76. See also Alan Hunt, 'The Big Fear: Law Confronts Postmodernism' (1990) 35 *McGill Law Journal* 507; Allan Hutchinson, 'Inessentially Speaking (Is There Politics After Postmodernism?)' (1991) 89 *Michigan Law Review* 1549.

⁷ See, especially, Scheppele, above n 2. This aspect of legal storytelling obviously intersects with long running jurisprudential debates about the nature of judicial decision making. I do not intend to explicitly engage with these debates in this article.

stories'; those that are part of, and reinforce, the dominant discourse. It is the claim that legal narratives are structured in ways which exclude, silence and oppress 'outsiders' — those not part of the dominant culture, particularly people of colour, women and the poor⁸ — that gives legal storytelling its explicitly political flavour.

A related claim is that 'voice', that is, the identity of the storyteller, makes a difference to the type of story told. The telling of stories by outsiders, the telling of counter-stories,⁹ is seen as a means of challenging dominant legal stories and thereby transforming the legal system so that it is more inclusive, and responsive to the needs of, outsider groups.¹⁰

It has been recognised that the ability of outsiders' stories to contribute to progressive legal change is, in the short term, partly dependent upon the willingness of legal decision makers to listen to these stories and on their ability to empathise with them.¹¹ This has led some proponents of legal storytelling to advocate the need to tell the stories of outsider clients in the courtroom, in ways which create empathy on the part of decision makers with the outsider group.¹² Others have become increasingly pessimistic about the ability and the willingness of those with power (judges and other decision makers) to participate in and contribute to progressive change.¹³

In this article I want to use the notion of legal storytelling to explore the official court stories in *Louth v Diprose*, that is, the particular narratives deployed by the various judges who decided the case. I hope to show that these stories are in fact stock stories about women, men and social class, and that they determined not only the specific outcome of the case but also the development of the doctrine of unconscionable dealing on which it was ostensibly based. I hope also to use *Louth v Diprose* as a basis from which to evaluate the strategy of telling outsiders' stories as a means of achieving progressive legal change.

⁸ Other outsider groups mentioned in the literature include lesbians and gay men and those with 'other' accents. See, eg, Fajer, above n 3 (referring to lesbians and gay men); Matsuda, 'Voices of America', above n 3 (referring to the 'differently' accented).

⁹ The term is Richard Delgado's: see Richard Delgado, 'Storytelling for Oppositionists and Others: A Plea for Narrative' (1989) 87 *Michigan Law Review* 2411.

¹⁰ It is also seen as a means of 'community building' within outsider groups, as well as contributing to social change through influencing insiders: see *ibid.*

¹¹ In the long term counter-storytelling may contribute to change in less direct ways, for example, through empowering outsider groups and through influencing public opinion generally.

¹² See, eg, Fajer, above n 3 and Lynne Henderson, 'Legality and Empathy' (1987) 85 *Michigan Law Review* 1574, arguing that the telling of stories of the lives of gay men and lesbians during the hearing of *Bowers v Hardwick* 478 US 92 L Ed 2d 140 (1986) (*Bowers*) may have produced a different outcome in that case. In *Bowers*, the United States Supreme Court found that the constitutional right to privacy did not prevent a state from criminalising 'sodomy'.

¹³ See, eg, Delgado, 'Zero-Based Politics', above n 3; Delgado and Stefancic, 'Norms and Narratives', above n 3; Toni Massaro, 'Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?' (1989) 87 *Michigan Law Review* 2099; Milner Ball, 'Stories of Origin and Constitutional Possibilities' (1989) 87 *Michigan Law Review* 2280. Cf Delgado, 'Storytelling for Oppositionists and Others', above n 9.

A CLASSROOM DIALOGUE

(Vicki Pedagogous enters her equity class. She motions for silence.)

Vicki Pedagogous:

The topic this week is the doctrine of unconscionable dealing. Could someone tell me, what are the elements of that doctrine?

Andrew Chieve:¹⁴

It's when one party to a transaction is under a special disability in dealing with the other party, and that disability is sufficiently evident to the stronger party to make it *prima facie* unfair or 'unconscientious' that they procure or accept the weaker party's assent. The onus is then cast on the stronger party to show that the transaction is fair, just, and reasonable.¹⁵ '[The doctrine] looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he [*sic*] should do so.'¹⁶

Vicki Pedagogous:

Good. The latest High Court case on this topic is *Louth v Diprose*. What are the facts of that case, and what was the result?

Andrew Chieve:

The basic issue in *Louth v Diprose* was whether Mary Louth was fully entitled to a house property which Louis Diprose had purchased and put in her name. In the Supreme Court of South Australia King CJ ordered that Louth transfer the house to Diprose on the basis that it was unconscionable for her to retain it.¹⁷ His Honour held that Diprose was 'in a position of emotional dependence upon [Louth]'¹⁸ and that she manipulated him by manufacturing a false atmosphere of crisis with respect to her living arrangements in order to influence him to provide the money for the house.¹⁹ An appeal to the Full Court of the Supreme Court of South Australia²⁰ was dismissed by a majority (Jacobs ACJ and Legoe J,

¹⁴ Andrew basically tells the story told by the trial judge, King CJ, and those judges who upheld his findings in the Supreme Court and High Court appeals in *Louth v Diprose*. The term 'majority judges' or 'majority judgment' will be used to refer to these judges (including King CJ) or judgments, unless specific reference is made to either one or more of them.

It is interesting to note that Mason CJ, Dawson, Gaudron and McHugh JJ, who form part of the majority in the High Court, refer to the 'facts' as presented in the judgment of Toohey J, who is in dissent. This is despite the fact that Deane J, who is also in the majority, sets out the 'facts' in detail by referring extensively to the judgment of the trial judge: see *Louth v Diprose* (1992) 175 CLR 621, 623 (Mason CJ), 639 (Dawson, Gaudron, McHugh JJ) and 636-7 (Deane J).

¹⁵ *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 474 (Deane J) (*Amadio*).

¹⁶ *Ibid.*

¹⁷ *Diprose v Louth (No 1)* (1990) 54 SASR 438, 449. His Honour held that both unconscionable dealing and undue influence was made out, but preferred to rest his judgment on the ground of unconscionable dealing.

¹⁸ *Ibid* 447.

¹⁹ *Ibid* 448.

²⁰ *Diprose v Louth (No 2)* (1990) 54 SASR 450.

Matheson J dissenting),²¹ and an appeal to the High Court of Australia was also dismissed by a majority (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ, Toohey J dissenting).²²

Vicki Pedagogous:

How did the litigation come about?

Andrew Chieve:

I'll tell you the background facts.²³

Mary Louth and Louis Diprose met at a party in Launceston in 1981. Both their marriages had broken down. Diprose, who was a solicitor in his early forties, had custody of three children. Louth had two children. They formed an acquaintance which lasted until late 1988. Sexual intercourse occurred on two occasions early in the relationship. Diprose apparently 'immediately fell very much in love with [Louth]'²⁴ and 'proposed marriage'²⁵ to her, which she refused.

In 1982 Louth moved to Adelaide where her sister and brother-in-law resided, in order to have their assistance which she needed because of her poor financial circumstances after the breakdown of her marriage. She moved into a house owned by them at a low rent.

In 1983 Diprose visited Louth in Adelaide, but '[s]he refused to go out with him'.²⁶ He later moved permanently to Adelaide, apparently because Louth lived there. He did not contact her immediately 'so that she would not think that she was being harassed'.²⁷ He sent her a collection of poems which he composed about her entitled 'The Mary Poems'. These poems expressed his feelings towards her. He then unsuccessfully attempted to visit her and her brother-in-law contacted him to inform him that she 'did not wish to see him'.²⁸

Later that year Louth telephoned Diprose a number of times and they met once, at her suggestion, after she had told him that she was depressed. She refused to give him her telephone number until several months later. At their meeting he 'told her that his feelings had not changed'²⁹ and she replied by saying, "'Oh well, if you don't try and hassle me I would probably let you sleep with me occasionally but I don't want any commit-

²¹ Although the majority altered the order, requiring Louth to pay Diprose the amount he had expended on the purchase of the house, plus interest, rather than requiring her to transfer the house to him: see *ibid* 453-4 (Jacobs ACJ), 456 (Legoe J).

²² *Louth v Diprose* (1992) 175 CLR 621. The majority upheld the initial order by King CJ.

²³ These 'background facts' are paraphrased from the judgment of King CJ, except where his Honour is directly quoted. Quotation marks are used for direct quotations.

²⁴ *Diprose v Louth (No 1)* (1990) 54 SASR 438, 439.

²⁵ *Ibid* 440.

²⁶ *Ibid*.

²⁷ *Ibid*.

²⁸ *Ibid*.

²⁹ *Ibid*.

ment”.³⁰ From about November 1983 until June 1985, Diprose telephoned and visited Louth ‘quite regularly.’³¹

He gave her jewellery and other gifts ‘including a television set, a dish-washing machine, a twin tub, and a dish drying machine’.³² ‘She would leave unpaid household bills lying about and he would pick them up and pay them.’³³ He regularly brought food to the house and he paid for her children to attend private schools.

Diprose lived in rented accommodation in Adelaide. He owned an aeroplane worth about \$25,000-\$30,000, an ‘old car’,³⁴ an interest in a house in Tasmania, \$91,000 which was lent on mortgage, and some interest totalling \$15,000-\$20,000. His debts amounted to about \$15,000.

Louth was on the ‘Supporting Mothers’ pension.’³⁵ She ‘had a history of mental instability’,³⁶ having ‘injured herself in apparent suicide attempts on some occasions’,³⁷ and having escaped a shoplifting conviction on ‘psychiatric grounds.’³⁸

Louth’s sister and brother-in-law separated in September 1984. There was some suggestion that she could not continue to live in the house owned by them at a low rent indefinitely. In May 1985 Louth and Diprose discussed the former’s housing situation and in June Diprose purchased the house in which she was living for \$58,000 and put it in her name. Settlement was effected in July. Diprose attended to the conveyancing involved in the transaction.

There were two conflicting versions of what was said and agreed with respect to the house in the May discussions.

Diprose’s account was as follows: Louth telephoned him sounding upset. She said she’d have nowhere to live and that she was depressed. Louth raised the house issue again three days later and other conversations followed. She mentioned the “‘dreadful life’”³⁹ she had had with her husband, “‘that she had been carted from one address to another [how] they were always short of money [and that] she felt very insecure’”.⁴⁰ She said that she had finally experienced “‘some security and stability’”⁴¹ in the house and that if she had to move again she’d kill herself and

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.* 441.

³⁶ *Ibid.* 440.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.* 443.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

“make a good job of it this time”.⁴² He “had no doubt that she may well do it and certainly try”.⁴³ He made a number of suggestions to her. He asked whether her family might be able to help but she was doubtful about this. He offered to give her a loan out of his mortgage moneys which were due to be paid out, but she ‘rejected the suggestion of a loan on the ground that she could not repay such a loan’.⁴⁴ He said that he could purchase the house and she could remain there as a tenant but she refused ‘on the ground that it would give [him] a hold over her which, in view of his sexual interest in her, was unacceptable’.⁴⁵ She finally agreed to his suggestion that he put the house in her name “on condition that [she] agreed to transfer it back”.⁴⁶

Louth’s account of what happened was that Diprose decided to make a gift of the house to her with “no strings attached”⁴⁷ so that she could feel secure, and that this occurred ‘in the course of general conversation about the future’⁴⁸ and the possibility that she might eventually have to move house. She denied having made any suicide threats and that a loan was ever mentioned, although she agreed that she had turned down an offer by Diprose that he buy the house and allow her to rent it.

After the purchase of the house and until the middle of 1988, the relationship between the parties ‘continued very much as before’⁴⁹ in terms of the contact between them and the material support provided by Diprose. Louth wanted to reduce ‘the number of his visits and conveyed that impression to him by her offhand behaviour.’⁵⁰

In mid-1988 Diprose was ‘without accommodation’⁵¹ during the period in which he had to vacate his rented premises and the date at which he obtained possession of a house he had purchased. Louth allowed him and his son to stay with her, but she became ‘irked by [his] continued presence in the house [and a] quarrel occurred’.⁵² Diprose told Louth he wanted the house transferred into his name. She refused and he left the house and sued her for it.

Vicki Pedagogous:

So whose version of events was believed?

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid 442.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

Andrew Chieve:

Diprose's of course. The trial judge, King CJ, found that Diprose was generally believable⁵³ but that Louth was 'a calculating witness who was prepared to tailor her evidence in order to advance her case.'⁵⁴ So Diprose's version of the May discussions was preferred, except for that part of his evidence where he claimed that he stipulated for a retransfer.⁵⁵ It was on the basis of his version of the May discussions that it was held that Louth manufactured a false atmosphere of crisis and that her conduct was unconscionable.⁵⁶

Penny Edant:⁵⁷

I don't think it's as simple as that. There was a real inconsistency in the trial judge's belief of Diprose in preference to Louth on everything but the stipulation for a retransfer. Matheson J, who was in dissent in the Supreme Court appeal, was 'troubled by ... [the trial judge's] disbelief of ... [Diprose] on the primary issue whether he paid for the house on the basis that it was to be ... [transferred back to] him on the one hand, an issue on which ... [Diprose] plainly gave false evidence, and by his belief of his evidence on secondary issues on the other hand'.⁵⁸ Toohey J, who dissented in the High Court, saw this as a 'dilemma' which served 'to expose the fact finding to greater scrutiny than would ordinarily be the case'.⁵⁹

I think Toohey and Matheson JJ have a real point here. The issue of whether Diprose made an outright gift of the house was thought to be the primary issue in the case. This turned on whether Diprose stipulated for a retransfer, and we know that the trial judge didn't accept Diprose's evidence that there was such a stipulation.

Andrew Chieve:

Penny, you are accepting the *minority* view. The trial judge himself was aware that this aspect of his findings might be subjected to criticism, so he dealt with the issue explicitly. His Honour explained: 'I have given careful consideration to the question of ... [Diprose's] credibility in relation to those matters in the light of my rejection of his evidence that he stipulated

⁵³ His Honour said in relation to Diprose: 'I found much of his evidence as to the general relationship of the parties and the circumstances in which the subject of the house transaction arose convincing': see *ibid* 443.

⁵⁴ *Ibid* 444.

⁵⁵ King CJ stated (*ibid* 445):

I am unable to accept ... [Diprose's] evidence, however, that he stipulated that [Louth] would be under an obligation to retransfer the house to him and I accept [Louth's] evidence that he told her that it was a gift ... [Diprose's] evidence that he stipulated for retransfer is intrinsically unlikely and is inconsistent with his own evidence as to how matters developed.

⁵⁶ In fact, it will be seen below that it was not exactly on the basis of Diprose's version of the discussions, but rather, King CJ's own version, that this finding was reached.

⁵⁷ Penny basically tells the story told by Matheson and Toohey JJ who dissented in the Supreme Court and High Court appeals respectively ('minority judges').

⁵⁸ *Diprose v Louth (No 2)* (1990) 54 SASR 450, 480.

⁵⁹ *Louth v Diprose* (1992) 175 CLR 621, 653.

for a right to have the house retransferred, but I am quite satisfied that on those matters his evidence is truthful and reliable and to be preferred to that of ... [Louth].⁶⁰

Penny Edant:

I don't think that giving 'careful consideration' to an inconsistency gets rid of it, and it certainly doesn't properly take into account the fact that on the critical issue of the retransfer, his evidence was rejected by the trial judge.

Andrew Chieve:

You didn't let me finish. What influenced Diprose's evidence on this point was the fact that he was 'a strange romantic character who had a sustained infatuation for ... [Louth]. When the scales fell from his eyes he bitterly regretted the transfer of the house'.⁶¹

I was also about to say that a number of the *majority* judges in the appeals also raised the issue of inconsistency but then *dismissed* it. Mason CJ concluded that 'the rejection of part of [Diprose's] evidence does not ... entitle this Court to disregard his Honour's acceptance of [Diprose] as a credible and accurate witness in relation to ... the circumstances leading up to the purchase of the house.'⁶² Deane J stated that the trial judge was 'fully conscious of a possible appearance of inconsistency in that regard',⁶³ and further, that the fact that his Honour 'generally preferred the evidence of [Diprose] to that of [Louth] clearly did not preclude him, as a matter of logic or common sense, from rejecting [Diprose's] evidence on a particular matter'.⁶⁴

Tran Scripts:⁶⁵

(*Angrily*) It was not just 'part of' Diprose's evidence that the trial judge didn't accept, or his evidence on just any 'particular matter'. Diprose's claim that he stipulated for a retransfer, and that therefore the house was not an outright gift, was the very basis of his case. Everyone really focused on this issue. Counsel for Diprose made it quite clear in his opening address that he considered the gift issue to be the real issue in the case.⁶⁶

⁶⁰ *Diprose v Louth (No 1)* (1990) 54 SASR 438, 448.

⁶¹ *Ibid* 443 (King CJ).

⁶² *Louth v Diprose* (1992) 175 CLR 621, 625.

⁶³ *Ibid* 635.

⁶⁴ *Ibid* 635-6.

⁶⁵ Tran tells an alternative story based on her own reading of the trial transcript. Given the theoretical premises of this article, it is trite to say that this story is not being presented as the truth or as fact either. Scheppelle, above n 2, 2097, reminds us that:

[T]he presence of different versions of a story does not automatically mean that someone is lying Stories can be told many ways, and even stories that lead to very different legal conclusions can be different plausible and accurate versions of the same event.

⁶⁶ See *Diprose v Louth*, Transcript of Proceedings, Supreme Court of South Australia, before King CJ, commencing 8 May 1990, 2 ('trial transcript');

[Louth] ... opposes the relief sought ... on the grounds that the conveyance of the house to her was by way of an unconditional gift and that's essentially the issue for your Honour. It's in a fairly

Not surprisingly, counsel for Louth concentrated on countering this aspect of Diprose's case.⁶⁷

This gives the finding that Diprose did not stipulate for a retransfer even greater significance. If the crux of his case was, as suggested by his counsel, based on this version of events, then surely this would affect his credibility on other issues. Moreover, it was not only once but *at least six times* during the course of the trial that Diprose attested to this version of events.⁶⁸

On the other hand, Louth's evidence on this point was accepted.⁶⁹ I am amazed that the trial judge could still consider Diprose to be the more reliable witness in these circumstances.

The unconscionable dealing claim was quite peripheral to the whole case as far as both parties and their lawyers were concerned. It was the last of a number of alternative claims with respect to the house.⁷⁰ It does not appear until paragraph 15 of the Statement of Claim,⁷¹ and is expressed to be '[i]n the further alternative'.⁷² Everyone, including the parties themselves, must have been quite surprised when the trial judge found that Diprose *had* made a gift of the house but nevertheless held in his favour on the basis of unconscionable dealing.

It is extremely unlikely that Louth would have bothered to fabricate evidence about the May discussions which may have had a bearing on the unconscionable dealing issue, given how peripheral it was thought to be. And it is incongruous to accept Diprose's contrary evidence on these

narrow compass.

Counsel for Diprose continued (trial transcript 8):

for the sake of completeness, that if contrary to the plaintiff's submissions your Honour came to the view that there was an out and out gift, we submit that that is voidable by reason of the unconscionability of the defendant. (My emphasis.)

⁶⁷ This tactic, which worked in so far as the claim based on the agreement to retransfer was concerned, proved counter-productive with respect to the unconscionable dealing claim. This is discussed below in the section titled 'Stories and Tactics: Strategies for Change'.

⁶⁸ Diprose stated in evidence: 'I said, "Well, look, I suppose I could put the house in your name but that would only be on condition that you agree to transfer it back to me" She was quite happy with that' (trial transcript 26); 'I then said to her "Now you will remember that eventually I want this transferred back to me because I have got three children as you know and I can't afford to give it to you, it is not a gift"' (trial transcript 36); 'I said "Well I'm sorry, that was the whole arrangement, that I would put it in your name if you transferred it to me"' (trial transcript 45); 'I was sick and tired of her putting off the discussion which had to come about transferring the house back' (trial transcript 46); 'I said "It's not going to be a gift"' (trial transcript 58); 'I said, "By the way, it is not a gift"' (trial transcript 77).

⁶⁹ See *Diprose v Louth (No 1)* (1990) 54 SASR 438, 445 (King CJ): 'I accept ... [Louth's] evidence that [Diprose] told her that it was a gift'; 'I place little reliance upon the evidence of [Louth] where it serves her own interests, but the other evidence in the case so strongly confirms that ... [Diprose] made a gift of the house to ... [her], that I have no hesitation in holding that there was such a gift.'

⁷⁰ The other alternative claims with respect to the house were that Diprose loaned the money to Louth; that the gift should be set aside for undue influence; and that it should be set aside for misrepresentation. Diprose also claimed for the return of various items of furniture on the basis that these were let to Louth.

⁷¹ *Diprose v Louth*, Amended Statement of Claim, Supreme Court of South Australia, 19 April 1990, 5.

⁷² *Ibid.*

minor issues in the context of the rejection of his evidence on the major issue.⁷³

It goes without saying that I am amazed that the majority judges on appeal could accept the trial judge's findings.

I also have a real problem with the trial judge's description of Louth as 'calculating', while Diprose's multiple statements under oath which the trial judge did not accept, are explained away on the basis that he was a 'strange and romantic character' who 'bitterly regretted' what he had done.

Penny Edant:

Tran, I've already expressed my agreement with your concern about this aspect of the trial judge's findings. But Matheson and Toohey JJ point to further evidence that supports their view of the case. They note that before Diprose purchased the house, he had a discussion with Louth's brother-in-law, who was an owner of the house. As a result of that discussion, it would have been clear to Diprose that there was no hurry to sell the house and that Louth faced no actual early crisis, *whatever she may have said to him* in the May discussions. So you see, we can ignore Louth's evidence on this point and still conclude that Diprose did not buy the house for her *as a result of* her manipulation.⁷⁴

Tran Scripts:

Penny, I agree that the evidence by Louth's brother-in-law works in Louth's favour. But there are other aspects of the case which the minority judges do not mention, which make the finding that Louth *manufactured* a crisis even more problematic.

It was counsel for *Diprose* who attempted at some length to make the point that there *was* in fact some urgency regarding the sale of the house.⁷⁵ As you know, the trial judge held that no such urgency existed, and he used this finding to conclude that therefore, based on Diprose's version of the May discussions, Louth must have *falsely manufactured* the urgency or crisis. In doing this, he accepted Diprose's version of the May discussions without accepting the rationale underlying that version, that is, that a crisis in fact existed. He chose aspects of each party's case and came to a

⁷³ Cf *Diprose v Louth (No 1)* (1990) 54 SASR 438, 445 (King CJ):

I am satisfied that the version of ... [Diprose] as to the circumstances in which the topic of the house transaction arose and as to the sequence of events leading to his decision to put the house into ... [Louth's] name is essentially accurate. I reject ... [Louth's] evidence on these matters where it is in conflict with that of ... [Diprose].

⁷⁴ Toohey J stated that the evidence did not support the finding that Louth manufactured an atmosphere of crisis but that in order to make good this proposition he thought it 'necessary to put to one side the evidence of [Louth] herself [because the trial judge] found her testimony ... to be "quite unimpressive"': see *Louth v Diprose* (1992) 175 CLR 621, 652 (footnote omitted); Matheson J stated that 'whatever [Louth] had said to [Diprose] about her sister seeking a property settlement, he must have realised after his conversation with [Louth's brother-in-law] that [Louth] was not facing an early crisis over the sale of the house': see *Diprose v Louth (No 2)* (1990) 54 SASR 450, 480.

⁷⁵ See trial transcript 131-9, 194-204.

conclusion that would have surprised both of them.

Furthermore, in his evidence, Diprose suggested that Louth *had* attempted suicide after the house was transferred to her.⁷⁶ Taken together with suicide attempts she had made in the past, this means that she may well have been suicidal during the May discussions. So even if, as Diprose claimed, she had made suicide threats in relation to the house in May, then it is likely that they were genuine and not part of a scheme to manipulate Diprose.

Basically, I don't think that even Matheson and Toohey JJ quite captured the extent of the inconsistency in the trial judge's findings on the issue of manipulation and on the question of the relative credibility of the parties.

I'm also troubled by the fact that Matheson and Toohey JJ felt they had to rely on the evidence by Louth's brother-in-law to support their conclusions. Toohey J, for example, thought it 'necessary to put to one side the evidence of [Louth] herself [because the trial judge] found her testimony ... to be "quite unimpressive"'.⁷⁷ This perpetuates the belief that Louth's testimony is inherently suspect, when, in fact, all the evidence points in the opposite direction. Ultimately, it takes away from Louth's credibility, which, in the context of the case as a whole, works against her.

Vicki Pedagogous:

There seems to be quite a bit of disagreement about the reliability of the parties and what went on before the purchase of the house.

Andrew Chieve:

I don't really see the point of this. The majority in the High Court accepted the trial judge's findings and we have to stick by that.

Vicki Pedagogous:

Let's move on. As Andrew has already mentioned, the doctrine of unconscionable dealing requires that one party suffer under a 'special disability' in dealing with the other party. Can someone tell me something about the parties and the relationship between them?

Andrew Chieve:

The relationship which existed between the parties 'placed [Diprose] in a position of emotional dependence upon [Louth] and gave her a position of great influence on his actions and decisions.'⁷⁸

Diprose was a 'strange and romantic character'.⁷⁹ He wrote 'love poems [which] were tender, often sentimental, sometimes passionate, very often

⁷⁶ Ibid 40. Louth confirmed that she had made two serious attempts to take her life in 1988: see ibid 118.

⁷⁷ *Louth v Diprose* (1992) 175 CLR 621, 652 (footnote omitted).

⁷⁸ *Diprose v Louth (No 1)* (1990) 54 SASR 438, 447 (King CJ).

⁷⁹ Ibid 443.

on the theme of unrequited love.⁸⁰ He ‘immediately fell very much in love’⁸¹ with Louth. He ‘had a deep emotional attachment to her and desired only to have her love and to marry her.’⁸² ‘[H]e was utterly vulnerable by reason of his infatuation.’⁸³ ‘[H]e had had unhappy domestic experiences and was anxious to lavish love and devotion upon a woman.’⁸⁴ He ‘tried to persuade her to remain in Launceston and proposed marriage’.⁸⁵ He helped her with her living expenses,⁸⁶ brought her foodstuffs, paid for her children’s school fees,⁸⁷ brought her expensive gifts⁸⁸ and eventually bought her a house; all this to a ‘woman who did not return his love’⁸⁹ and when he ‘had only limited assets ... [and] had to work as an employee solicitor for a living ... [with] three children [in his care] who had natural claims upon his bounty.’⁹⁰

Louth’s attitude towards Diprose was ‘quite indifferent’,⁹¹ ‘offhand’⁹² and niggardly.⁹³ She ‘would leave unpaid household bills lying around’,⁹⁴ and she ‘tolerated his visits and his company because of the material advantages which resulted. The result of this toleration was to feed the flames of ... [Diprose’s] passion and to keep alive his hopes that [Louth] would relent and that his devotion would be requited.’⁹⁵ She ‘deliberately manufactured the atmosphere of crisis [with respect to her living arrangements] in order to influence [Diprose] to provide the money for the house ... [S]he played upon his love and concern for her by the suicide threats ... then refused offers of assistance short of full ownership of the house knowing that his emotional dependence upon her was such as to lead inexorably to the gratification of her unexpressed wish to have him buy the house for her ... [I]t was a process of manipulation to which he was utterly vulnerable by reason of his infatuation.’⁹⁶

Penny Edant:

The expressions you use to describe Diprose, ‘while colourful ... assume that a “normal” standard of conduct ... is readily discernible ... [and] tend to give an unbalanced picture of the relationship between the parties by

⁸⁰ Ibid.
⁸¹ Ibid 439.
⁸² Ibid 447.
⁸³ Ibid 448.
⁸⁴ Ibid 447.
⁸⁵ Ibid 440.
⁸⁶ Ibid.
⁸⁷ Ibid 442.
⁸⁸ Ibid 448.
⁸⁹ Ibid.
⁹⁰ Ibid.
⁹¹ Ibid 447.
⁹² Ibid 442.
⁹³ Ibid 449.
⁹⁴ Ibid 440.
⁹⁵ Ibid 447.
⁹⁶ Ibid 448.

placing undue emphasis on one of them.⁹⁷ The relationship was not one in which Louth had all the power and Diprose was completely subject to her influence.

Diprose was a solicitor in his forties who had been married and divorced twice. He was under no misapprehensions and knew exactly what he was doing. He attended to the conveyancing himself and had ready access to colleagues for legal advice. It was his idea to buy the house and to send Louth's children to private schools. He knew there was no urgent need for Louth to leave the house, whatever she, herself may have said to him.⁹⁸

'[T]he relationship was one [Diprose] was prepared to accept and to foster over about seven years ... it was one which [Diprose] must have seen as having something to offer him ... [He] continued as a constant visitor, involved in various aspects of [Louth's] domestic life [T]he children of the two families seem to have had a close relationship'.⁹⁹

Louth did not promise him anything in return and gave him no encouragement. She turned to him for help when she was depressed. She suffered from recurring depression caused by the breakdown of her marriage and the memory of a brutal rape in 1968 in which she thought she was going to be murdered. During 12 years of marriage she had moved her home on many occasions. She had had the removal of a cancerous appendix and a complete hysterectomy. She had made several suicide attempts. She had been caught for shoplifting but was not convicted on psychiatric grounds. Diprose knew all this history.¹⁰⁰

Diprose was infatuated and emotionally involved with Louth, but he was not emotionally dependent on her and she did not have great influence over his actions and decisions.¹⁰¹ 'In many respects [Louth] depended on [Diprose]. In many respects he had a "great influence on [her] actions and decisions"'.¹⁰² As a result, Diprose did not prove the necessary relationship needed to make out a case of unconscionable conduct.¹⁰³ He 'failed to make good the proposition that his relationship with ... [Louth] placed him in some special situation of disadvantage [and that he was] emotionally dependent upon her in any relevant legal sense'.¹⁰⁴

⁹⁷ *Louth v Diprose* (1992) 175 CLR 621, 641 (Toohey J).

⁹⁸ This paragraph is paraphrased from the judgment of Matheson J: see *Diprose v Louth (No 2)* (1990) 54 SASR 450, 479-82. Interestingly, his Honour felt it necessary to 'supplement' the summary of "'background facts'" provided by Legoe J: see *Diprose v Louth (No 2)* (1990) 54 SASR 450, 475 (Matheson J).

⁹⁹ *Louth v Diprose* (1992) 175 CLR 621, 651-2 (Toohey J). His Honour also felt he had to go over the facts 'at some length': see *Louth v Diprose* (1992) 175 CLR 621, 643.

¹⁰⁰ This paragraph is paraphrased from the judgment of Matheson J: see *Diprose v Louth (No 2)* (1990) 54 SASR 450, 479-482.

¹⁰¹ *Ibid* 480 (Matheson J).

¹⁰² *Ibid*.

¹⁰³ *Ibid* 482.

¹⁰⁴ *Louth v Diprose* (1992) 175 CLR 621, 655 (Toohey J) (footnote omitted).

Vicki Pedagogous:

These two accounts are quite different. Which is the more accurate?

Andrew Chieve:

The account I have given is taken from the findings of fact made by the trial judge. Penny's account is taken from the findings of the minority judges. The trial judge's findings were upheld by majorities in the Supreme Court appeal and in the High Court. Obviously, it is this account which is to be preferred.

Tran Scripts:

I disagree with both of these accounts.

To start with, Diprose's pursuit of Louth and his 'romantic' overtures toward her may have been less benign than the accounts by the trial judge *and* the minority judges indicate.

Before Louth left Launceston for Adelaide, Diprose tried to persuade her to stay and proposed that she sign a contract to the effect that she would live with him 'as man and wife' and that in return he would give her various things.¹⁰⁵ Louth refused this offer. So far, this has simply been described as a proposal of marriage which was refused or rejected.¹⁰⁶ To me, it sounds more like a calculated attempt to strike a bargain.

The judgments refer to a 'quarrel' or 'argument' between the parties while Diprose was temporarily staying with Louth in 1988.¹⁰⁷ The use of the words 'quarrel' and 'argument' give no indication of the fact that this involved verbal and physical violence. In her description of events Louth stated that when she told Diprose to leave the house he responded '[t]hat I was an ungrateful bitch He got pretty nasty and in front of my son he called me a whore and he called [*sic*] me that I slept with everybody in Adelaide, why couldn't I sleep with him, and hurt my son and me ... I kned him because he got hold of me, that's all I could do. So I kned him and then I ran into the bedroom and then he called me all those names and my son was there too ... I rang a friend of mine to come around because I was scared.'¹⁰⁸ And again in cross examination Louth stated that '[h]e was pushing me all around, calling me names.'¹⁰⁹ Diprose's version of this incident was a little different: 'she said "Look, let's not argue about this, let's be friends."' She came over to me, put her arm around my neck, I

¹⁰⁵ See trial transcript 7, 51, 95. Louth stated in evidence: 'he had a contract, that he would give me so much money if I stayed I put it in the fire' (trial transcript 95).

¹⁰⁶ See, eg, *Diprose v Louth (No 1)* (1990) 54 SASR 438, 440 (King CJ); *Louth v Diprose* (1992) 175 CLR 621, 644 (Toohey J).

¹⁰⁷ See *Diprose v Louth (No 1)* (1990) 54 SASR 438, 442 (King CJ) ['quarrel']; *Diprose v Louth (No 2)* (1990) 54 SASR 450, 460 (Legoe J) ['argument']; *Louth v Diprose* (1992) 175 CLR 621, 647 (Toohey J) ['quarrel'].

¹⁰⁸ Trial transcript 110.

¹⁰⁹ *Ibid* 169.

kissed her and then she attempted to knee me in the groin.’¹¹⁰

Because the trial judge was not interested in pursuing the issue of violence, (‘Does the physical violence really matter. It is a peripheral thing.’¹¹¹) there was little other information about this altercation presented at the trial.

However, in her evidence, Louth testified to another violent outburst which allegedly occurred while Diprose was staying with her: ‘He said “I’ll see you rot in hell and I’ll take you to the courts and I’ll go to the highest Supreme Court and then the High Court”. He said he would do anything and then he would burn the house down.’¹¹² Louth had even approached the police about Diprose’s presence in the house.¹¹³

Apart from the violence, there is the possibility that Diprose may have been sexually harassing Louth in the sense of subjecting her to unwanted sexual advances. There is a hint of this in the judgments, where mention is made of the fact that Diprose did not contact Louth immediately on his arrival in Adelaide so that she would not think she was being ‘harassed’; that Louth had her brother-in-law contact Diprose to tell him she did not wish to see him; and that Louth initially refused to give him her telephone number.¹¹⁴ The explicit sexual content of one of the 91 poems (‘The Mary Poems’) which Diprose wrote about Louth and which he sent her is evident from the extract included in the judgment of Legoe J:

“‘I feel you biting my neck, our intertwined tongues,
Your awakening nipples under my busy hands;
And I take you and f... you deeply in my thoughts.’”¹¹⁵

Amazingly, in none of the judgments are these facts presented or described as sexual harassment. Instead, they are viewed as evidence that Diprose was romantic, infatuated, dependent and persistent, despite Louth’s rejections.¹¹⁶

There was further evidence given at the trial which suggests harassment:

- The reason Louth gave for not immediately giving Diprose her telephone number was ‘because she had had a number of prank calls and

¹¹⁰ Ibid 45.

¹¹¹ Ibid 169 (King CJ).

¹¹² Ibid 111.

¹¹³ Louth said in evidence: ‘I remember going to the Norwood Police Station to see what I could do about the matter’: *ibid*. See also *ibid* 172.

¹¹⁴ See *Diprose v Louth (No 1)* (1990) 54 SASR 438, 440 (King CJ); *Diprose v Louth (No 2)* (1990) 54 SASR 450, 457-8 (Legoe J); *Louth v Diprose* (1992) 175 CLR 621, 644 (Toohey J).

¹¹⁵ *Diprose v Louth (No 2)* (1990) 54 SASR 450, 457.

¹¹⁶ King CJ’s description of the poems as ‘love poems ... [which] were tender, often sentimental, sometimes passionate, and very often on the theme of unrequited love’, has already been noted: *Diprose v Louth (No 1)* (1990) 54 SASR 438, 439. Toohey J quoted this description with approval: see *Louth v Diprose* (1992) 175 CLR 621, 644. Legoe J stated that the poems displayed ‘a passionate obsession for her’: *Diprose v Louth (No 2)* (1990) 54 SASR 450, 457. Interestingly, it was counsel for Louth who submitted the poems as evidence for Louth. The use of this tactic is discussed below in the section titled ‘Stories and Tactics: Strategies for Change’.

she had had the number changed.¹¹⁷

- The reason Louth gave for not accepting Diprose's offer that he buy the house and let her live in it was this: 'I would feel that he would be like threatening me if I did that.'¹¹⁸
- Louth referred to Diprose's continuing sexual advances towards her: 'he kept plying me with champagne and then trying to seduce me after.'¹¹⁹ She also said that she found it increasingly difficult to handle his approaches.¹²⁰
- Louth gave evidence of another incident: 'I went around to see my friend and he followed me around there and I said I didn't want ever to see him again because he was following me, too.'¹²¹
- Statements made by Louth's sister and brother-in-law at the trial indicate that they believed Diprose was capable of harassing behaviour.¹²² Certainly Diprose himself admitted that Louth found his attentions 'uncomfortable' and an 'annoyance'.¹²³
- Referring to the time when Diprose temporarily stayed with her in 1988, Louth stated that 'he would be waiting for me all the time and looking at me',¹²⁴ and 'every time I got back from shift work he would be sitting there looking at me and he would try advances on me ... He would try and give me a drink or try and put his arms around me and say, "Come on, let's go to bed."¹²⁵

All of this evidence, no mention of which is made in the judgments, hardly paints Diprose as a harmless romantic.

Further, although the minority judges disagreed with the majority finding that Diprose suffered from a special disability and that he was the weaker party, they too were blind to the fact of Diprose's considerably superior economic position. All of the judgments suggested that Diprose was not a wealthy man. His assets were described as 'limited' and reference was made to the fact that he was living in 'rented accommodation' and 'had to work as an employee solicitor for a living'.¹²⁶ The trial judge referred to

¹¹⁷ Trial transcript 12 (evidence given by Diprose).

¹¹⁸ *Ibid* 100.

¹¹⁹ *Ibid* 108.

¹²⁰ See *ibid* 111.

¹²¹ *Ibid* 129.

¹²² Sarah Cartwright, Louth's sister, stated that she 'found him very strange and his attitude to Mary very strange and threatening at times' (trial transcript 187). Arch Volkhardt, Louth's brother-in-law, wanted to be 'left in no doubt that [Diprose] wasn't going to use ... [his purchase of the house] as some leverage against Mary in the future' (trial transcript 191).

¹²³ See *ibid* 55, 68.

¹²⁴ *Ibid* 167.

¹²⁵ *Ibid* 170. It was noted above that the trial judge described Louth's desire to have Diprose leave the house as 'niggardl[y]': see *Diprose v Louth (No 1)* (1990) 54 SASR 438, 449 (King CJ).

¹²⁶ See, eg, *Louth v Diprose* (1992) 175 CLR 621, 636 (Deane J): 'Putting to one side an old car, a Chipmunk aeroplane ... and a share in a house owned with other members of his family in Tasmania, his net assets totalled less than \$100,000'; *Diprose v Louth (No 1)* (1990) 54 SASR 438, 448 (King CJ): 'he had only limited assets ... the mortgage moneys were his principal asset and ... he

the following assets owned by Diprose: mortgage moneys worth '\$91,000, an old car, an aeroplane of the value of \$25,000/\$30,000 ... interest worth about \$15,000 or \$20,000, and a house owned with other members of his family ... [and] debts of about \$15,000.'¹²⁷

Compared with Louth, who was on the supporting parents' benefit at the time, and who appears to have owned no significant assets at all, it seems to me that Diprose was very well off indeed. His assets were not inconsiderable. I would have thought that owning an aeroplane and being a solicitor, even an *employee* solicitor, is pretty privileged.

There was also evidence that Diprose received a 'loan' of \$120,000 from his mother in 1988.¹²⁸ Whether this money had to be repaid or not, it is clear that he at least had access to a large sum from private sources. The 'old car' referred to was in fact two cars, an old Toyota and an antique MG.¹²⁹

A further aspect of the trial concerns me. There was no attempt to get a broader picture of who Mary Louth was and what she did ...

Andrew Chieve:

(Interrupting) This is meant to be an equity class. We are supposed to be discussing the doctrine of unconscionable dealing, not 'Days of our Lives'!
(Andrew walks out. Vicki struggles to conceal a smile. The class continues...)

The classroom dialogue tells us three stories about *Louth v Diprose*. Each story is quite different, yet they are all derived from the same evidence, the same facts, presented at the trial. Not only does the interpretation of that evidence differ from story to story, but the 'facts', the 'same facts', are indeed different in each story. Some 'facts' are included, some excluded in the process of developing each particular narrative.

STOCK STORIES: DAMNED WHORES, ROMANTIC FOOLS, DAMSELS IN DISTRESS AND KINDLY GENTLEMEN

In this section I want to explore the various narratives deployed in more detail. Whose story do they tell or privilege, and whose voice is missing? What does each narrative tell us generally about women like Mary Louth and men like Louis Diprose?

In the story told by the trial judge and echoed by the majority judges on appeal, Diprose is depicted as the classic romantic fool who is powerless in the

had to work as an employee solicitor for a living.'

¹²⁷ *Diprose v Louth (No 1)* (1990) 54 SASR 438, 440-1 (King CJ).

¹²⁸ Trial transcript 44 (evidence given by Diprose).

¹²⁹ *Ibid* 160 (evidence given by Louth).

face of love. He is so utterly in her power that he pursues her and showers her with gifts *even though he gets no sex in return for it*. He is also a very nice man. Not only is he generous, but he is helpful and supportive, he wants marriage; he is a loving father whose concern extends beyond his own children to her children as well. His generosity is more significant for the fact that his assets are so limited.

Louth, on the other hand, is portrayed as the archetype 'damned whore'.¹³⁰ She lies, she is obviously from the 'lower classes',¹³¹ she is slovenly, conniving and materialistic. Her morals are suspect. Her sexuality is dangerous. She uses it to get what she wants, but she persists in denying him that which he has well and truly paid for. She is not a nice woman. She is a tease. *She* has power over *him*.

There is nothing subtle about this story. It stands out for its vivid characterisations of both parties, the ample use of metaphor, and generally, the presence of an explicit 'narrative' flavour. When the powerful image of the 'damned whore' is juxtaposed with that of the 'love-struck knight in shining armour', we know immediately that Louth must lose the case.

A somewhat different story is told by the minority judges. For them, Louth is less suspect. She might not be as conniving and manipulative as the majority makes out. Perhaps she told the truth about the May discussions. In fact, she is more of the victim-type, a 'damsel in distress'.¹³² She deserves our pity. She is a single mother, after all, and she is poor. Sick, emotionally unstable, suicidal, victim of rape, oppressed former wife — that's Mary Louth.

The minority story continues: Mary Louth, victim, is fortunate to have met a very kindly and generous gentleman, Louis Diprose. A romantic man of limited assets, he showered her with gifts. But he is not entitled to take those gifts back just because he regrets giving them. He is a grown professional man who knew what he was doing. He is not a fool, and he must have been getting something out of the relationship. Louth and he were on relatively *equal* terms.

This story is more subtle. The acknowledgment of Louth's tragic past results in a depiction of her which is in marked contrast to the majority story. But the stereotype is reversed rather than eliminated. She turns from undeserving whore into pitiful victim, a status which makes it acceptable for the minority to find that she should keep the house in the circumstances (those circumstances being that it was given to her as an outright gift and that it would be stretching the doctrine of unconscionable dealing beyond its previous parameters to set it aside on that basis¹³³). However the persistence of the image of Diprose as benign

¹³⁰ This term is borrowed from Anne Summers, *Damned Whores and God's Police: the Colonisation of Women in Australia* (1975), who argues that the 'damned whore' stereotype of women in Australia dates back from the beginning of white 'settlement'.

¹³¹ This term is derogatory because it implies a ranking of classes, but it is here used deliberately to highlight what appears to be a negative view of Louth.

¹³² See Anne Bottomley, 'Self and Subjectivities: Languages of Claim in Property Law' (1993) 20 *Journal of Law and Society* 56, 57, where the author argues that Lord Denning's construction of the female plaintiff in *Eves v Eves* [1975] 1 WLR 1338 as a 'damsel in distress' assisted his finding in her favour on the basis of a constructive trust.

¹³³ This is discussed below in the section titled 'Stories and Doctrinal Development: Unconscionable

romantic suitor (albeit one who, in this story, is in control of his faculties) results in an ambivalent attitude towards his failure and her success. We are reminded that although the law allows her to keep the house, she does not really *deserve* to keep it. Matheson J made this quite clear by saying that although he did not agree that the transaction was unconscionable in a legal sense, it 'was unconscionable in the sense that [Louth] had done nothing to deserve such beneficence, and in the sense that it deprived [Diprose's] children of, perhaps, a substantial part of their inheritance.'¹³⁴ Toohey J made a similar comment.¹³⁵ We can only speculate as to what she could have done in order to deserve his beneficence.

The depiction of Louth as generally less suspect and the relationship between the parties as relatively equal, led the minority to conclude that unconscionable dealing was not made out. However, *both* of the stories told in the case are stock stories. Whether it's whore or victim, kindly gentleman or romantic fool, these images not only fail to capture the complex nature of human subjectivity, but they also reinforce dominant stereotypes about women, particularly poor women, and about men.

Moreover, the construction of Louth as the more powerful party (by the majority) *and* the construction of the power relationship between them as relatively equal (by the minority) ignores the structural inequalities in that relationship based on Diprose's position as a moneyed man.¹³⁶ The emphasis on Diprose's 'limited' assets is farcical given his position of relative social and economic privilege compared with Louth's position as social security recipient.¹³⁷ Both narratives render gender and social class irrelevant while at the same time reproducing stereotypes based on those very categories.

Tran alerts us to the gaps and silences in the official court stories. Her reading of the case is more sensitive to issues of gender, class, and structural power. In her narrative we are introduced to the idea that Louth might have experienced

Dealing in Louth v Diprose.

¹³⁴ *Diprose v Louth (No 2)* (1990) 54 SASR 450, 475-6.

¹³⁵ 'It was of course a very generous gift in the circumstances; it was a gift that [Diprose's] children might justifiably have resented': see *Louth v Diprose* (1992) 175 CLR 621, 653.

¹³⁶ In their joint judgment, Dawson, Gaudron and McHugh JJ alluded to this issue but nevertheless upheld the trial judge's findings (*Louth v Diprose* (1992) 175 CLR 621, 639):

The trial judge's conclusions are not conclusions which would readily be reached in relation to persons of the same background as the parties. [Diprose] is a male solicitor with, presumably, some experience of worldly affairs and [Louth] is a woman to whom he was emotionally attached and who, at the time, was experiencing financial hardship and emotional difficulties. Given the ordinary expectations with respect to men of professional standing and the assumptions generally made with respect to the relationships between men and women, it may be taken that [Diprose's] case was one involving a substantial evidentiary burden.

¹³⁷ It could be argued that to point to these structural inequalities merely reproduces the stereotype of women as victims. This issue has generated a substantial amount of feminist debate. See, eg, Elizabeth Sheehy, *Personal Autonomy and the Criminal Law: Emerging Issues for Women*, Background Paper, Canadian Advisory Council on the Status of Women, Ottawa, September 1987, in Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (1990) 40; Catherine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (1987) especially 32-45; Joan Scott, 'Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism' (1988) 14 *Feminist Studies* 33. Although I do not intend to engage with this debate here, I believe that at least labelling these inequalities as 'structural' implies that they are systemic rather than a result of personal or group weakness or failure.

what the judges described as Diprose's romantic 'infatuation' with her as sexual harassment, especially in the context of her history of rape. Tran's narrative also alerts us to the extent of the inconsistency involved in the trial judge's construction of Louth as dishonest, calculating, and manipulative, as well as to the centrality and frequency of Diprose's statements at the trial which were not accepted by the trial judge. Finally, it is only in her narrative that Diprose's economic and social power as a professional man is juxtaposed with Louth's position at the bottom of the class hierarchy.

But this is an unofficial story. It has no claim to truth because it is not court sanctioned and it is not situated within the dominant discourse. In contrast, both of the stories by the majority and minority judges have the status of 'truths' or 'facts' (women are either victims or conniving, manipulative, dangerous; advances by men who are sexually interested are romantic, they are not sexual harassment; social class does not exist; structural power based on gender does not exist). The stories they tell have this power because they draw on and reinforce already existing stock stories and because the law itself plays a powerful role in the creation of these stock stories (and judges are central to that process).¹³⁸ In the final section of this article I consider whether the telling of Tran's story could have made a difference both to the specific case outcome (and the parties) and in the broader sense of contributing to progressive legal change.

At this point, however, I want to examine how the narrative deployed by the majority ensured Diprose's victory.

STORIES AND DOCTRINAL DEVELOPMENT: UNCONSCIONABLE DEALING IN *LOUTH V DIPROSE*

If Diprose was going to win the case it was necessary for the majority to construct powerful images of both parties because the law was not on his side. It nevertheless still proved a challenging task to fit the narrative into a legal category which would provide Diprose with a remedy. The doctrine of unconscionable dealing was ostensibly the 'legal' basis for the decision in the end, but its application to the case involved some interesting manoeuvring.

The doctrine as it stood prior to *Louth v Diprose* made the application of it to that case difficult.¹³⁹ The requirement that the party wishing to impugn the transaction be labouring under some special disability had traditionally resulted in that party clearly being 'weak' in relation to the other party and the power disparity between them obvious. *Louth v Diprose* was very different from previous cases in which the doctrine was successfully pleaded. A number of

¹³⁸ See, eg. Scheppele, above n 2, 2079:

It is the implicit contrast between those whose self-believed stories are officially approved, accepted, transformed into *fact*, and those whose self-believed stories are officially distrusted, rejected, found to be untrue, or perhaps not heard at all. Those whose stories are believed have the power to create fact; those whose stories are not believed live in a legally sanctioned 'reality' that does not match their perceptions. (Footnote omitted.)

¹³⁹ The basic elements of the doctrine were set out by Andrew Chieve, above.

examples from these cases will serve to illustrate this point.

The 'weaker parties' in *Commercial Bank of Australia Ltd v Amadio*¹⁴⁰ were an elderly Italian couple with a limited grasp of written English, who signed an unlimited mortgage and guarantee to a bank relating to all present and future debts of their son's building company. They mistakenly believed that the company was prosperous (the bank in collaboration with the son had selectively dishonoured cheques to give the company the appearance of solvency when it was clearly insolvent) and they relied on their son's misleading advice that their liability would be limited to \$50,000 and to a period of six months, when in fact there were no such limits and their total liability eventually turned out to be \$240,000. The 'stronger party' was a large bank with connections to the son's business and full knowledge of its financial position and of the contents of the mortgage and guarantee.

In *Blomley v Ryan*¹⁴¹ the 'weaker party' was 78 years old, 'uneducated', and an alcoholic. While intoxicated, he signed a contract of sale of his grazing property on terms very favourable to the purchaser, whose representatives, knowing of his addiction, had brought alcohol to the negotiations.

In *Wilton v Farnworth*¹⁴² the 'weaker party' was 'markedly dull-witted', 'stupid', had 'little education', 'a history of curious conduct' and was 'hard of hearing'. He signed documents making over the estate of his deceased wife to his stepson, having no idea of the considerable size of the estate and being preoccupied with other matters at the time.

In all of these cases it is clear that there was a power disparity between the parties, an 'absence of any reasonable degree of equality'¹⁴³ between them. The fact that the power relationship is central to the concept of 'special disability' is reinforced by the language of 'weak' and 'strong' in the judgments.

In *Louth v Diprose* the majority had to somehow fit a very different situation into the doctrine. It was undeniable that Diprose was a middle-aged, middle class, male lawyer, and that Louth was a 'single mother' on a social security pension. In the circumstances, it was necessary for the majority to do some very fancy foot work in order to construct him as the 'weaker party' and Louth as the 'stronger party'. This was achieved, in part, by the juxtaposition of the powerful images of Diprose as pathetic, utterly infatuated and emotionally dependent romantic fool, and Louth as dangerous, undeserving and calculating.

But to have left it there would have 'opened the floodgates' to claims of unconscionable dealing in circumstances where a party transacted with someone on whom they were emotionally dependent. If proof of emotional dependence (and knowledge of it by the stronger party) created a *prima facie* case of unconscionable dealing, then typically, women might effectively use the doctrine to escape transactions entered into for the benefit of their spouses.¹⁴⁴

¹⁴⁰ (1983) 151 CLR 447.

¹⁴¹ (1956) 99 CLR 362.

¹⁴² (1948) 76 CLR 646.

¹⁴³ *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 474 (Deane J).

¹⁴⁴ The problem of 'sexually transmitted debt', for example, where women are left bearing the burden

That this would not be the result of a finding in Diprose's favour was ensured by the addition of a further element in the reasoning of the majority.

This further element came in the form of the finding that Louth manufactured a false atmosphere of crisis, that is, that she manipulated Diprose into purchasing the house. The trial judge and each majority judge on appeal considered the presence of this factor as *essential* to their conclusion that Diprose should recover the house on the basis of unconscionable dealing.¹⁴⁵ The effect of this was to close off what could be read as a significant expansion of the doctrine in a direction which might have been of considerable benefit to women.¹⁴⁶

The glaring inconsistencies involved in the finding that Louth manufactured a crisis and that it was as a result of her manipulation that Diprose purchased the house, have been discussed above. The vivid portrayal of Diprose as a harmless romantic and Louth as conniving, manipulative, lying and undeserving (of course she manipulated him, you can't believe a thing she says) made the acceptance of this most unlikely version of events possible.

STORIES AND TACTICS: STRATEGIES FOR CHANGE

I now want to turn to the question of what might have been done to make a difference to this case, both in terms of the actual result, and also in the broader sense of combating the stock stories on which it was based. I intend only to raise a number of issues which bear upon a consideration of this question, rather than to offer any definitive conclusions.

of the debts of their male partners as a result of having signed guarantees on their behalf, is widespread. See, eg, Australian Law Reform Commission, Discussion Paper No 54, *Equality before the Law* (1993) 135-6.

¹⁴⁵ See *Diprose v Louth (No 1)* (1990) 54 SASR 438, 448 (King CJ):

By reason of [Diprose's] infatuation and [Louth's] manipulation of it he was 'unable to make a worthwhile judgment as to what is in his best interest' [Louth] was well aware of that and her manufacture of an atmosphere of crisis where no crisis existed was dishonest and smacked of fraud. To my mind [Louth's] unconscientious use of her power over [Diprose] resulting from his infatuation, renders it unconscionable for her to retain the benefit of such a large gift out of [Diprose's] limited resources. (My emphasis.)

See also *Louth v Diprose* (1992) 175 CLR 621, 638 (Deane J, with whom Dawson, Gaudron and McHugh JJ agreed on this point):

That special disability arose not merely from [Diprose's] infatuation. It extended to [his] ... extraordinary vulnerability ... in the false 'atmosphere of crisis' in which he believed the woman with whom he was 'completely in love' with and upon whom he was emotionally dependent was facing eviction from her home and suicide unless he provided the money for the purchase of the house. [Louth] was aware of that special disability. Indeed, to a significant extent, she had deliberately created it. She manipulated it to her advantage [T]he case was not simply one in which [Diprose] had, under the influence of his love for, or infatuation with, [Louth], made an imprudent gift in her favour. The case was one in which [Louth] deliberately used that love or infatuation and her own deceit to create a situation in which she could unconscientiously manipulate [Diprose] to part with a large proportion of his property. The intervention of equity is not merely to relieve the plaintiff from the consequences of his own foolishness. It is to prevent his victimization. (Footnote omitted, my emphasis.)

See also *Louth v Diprose* (1992) 172 CLR 621, 624 (Mason CJ), 632-3 (Brennan J); *Diprose v Louth (No 2)* (1990) 54 SASR 450, 452 (Jacobs ACJ), 474 (Legoe J).

¹⁴⁶ The precise nature of this additional factor, the manipulative behaviour, makes it even less likely that this case could be used as a precedent on behalf of women seeking to set aside transactions against male partners, because manipulative behaviour is stereotypically female and not male.

The Case Presented for Louth: Romantic Suitor Makes a Gift

It is interesting to note that Louth's case as presented at the trial facilitated the formation of the narratives deployed by the courts. Firstly, it contributed to the ultimate construction of Diprose as a benign romantic fool. The 91 'Mary Poems' were introduced as evidence for her defence and Diprose was allowed enormous scope and leeway to discuss his poetry before the Court. At no stage during the presentation of her case was it suggested as a possibility that she might have felt threatened or harassed on receipt of the poems.¹⁴⁷ Diprose's advances towards Louth and her annoyance at them were brought up only in the context of demonstrating that Diprose wanted an intimate relationship with her rather than to suggest that he might have been harassing her.¹⁴⁸

Further, the legal strategy presented on her behalf did not involve making an issue out of the structural inequality between the parties. It therefore provided no counternarrative to the construction of the power relationship between them as relatively equal or as working in Diprose's favour.

The strategy employed in Louth's defence is understandable given that it was generally believed that the result of the case hinged on the issue of whether Diprose made an outright gift of the house or whether he stipulated for a retransfer.¹⁴⁹ If it could be shown that Diprose was a romantic character who was in love with Louth then the gift scenario would be plausible. This strategy did in fact work as far as the gift issue was concerned but it back-fired when the trial judge used the construction of Diprose as an obsessed romantic to support the argument that he suffered from a special disability for the purposes of the unconscionable dealing claim.

On this basis Louth's own case ended up supporting the narratives which ultimately led to a finding against her. Moreover, it served to reinforce rather than challenge the stock stories which rendered her experience and her reality invisible.

This raises two related questions. If a different strategy was employed, if Louth's story was told differently, could this have influenced or changed the official court stories which prevailed? If so, what sort of story would prove most effective from Louth's point of view?

Telling Outsiders' Stories: Will Judges Listen?

The legal storytelling literature suggests that the telling of outsiders' stories both in and out of court may challenge dominant legal stories and thereby

¹⁴⁷ In cross examination, Diprose was permitted to express the meaning of the poems and how they related to his feelings for Louth at the time. The trial transcript shows that Diprose was given a lot of time and space in which to do this. Pages 52-5 and 65-70 of the trial transcript are dominated by Diprose's comments on the poetry. The following is an example of the nature of Diprose's comments (trial transcript 68): 'That was a eulogy The idea came to me from Shakespeare's sonnet [*sic*] basically the words within it are reasonably true. At the same time I think I set them to lute music as well'.

¹⁴⁸ See trial transcript 68.

¹⁴⁹ See, generally, the discussion above.

contribute to progressive legal change.¹⁵⁰ In the context of gay rights litigation, for example, Marc Fajer has argued that advocates must tell the stories of the lives of lesbians and gay men in order to create empathy among judges and to attack the myths about gay life to which they may adhere.¹⁵¹ The critical race theorist, Richard Delgado, has also advocated 'counter-storytelling', arguing that stories are a powerful means of destroying mindset, 'the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place'.¹⁵²

In the present context, would the telling of Mary Louth's 'outsider story' have challenged the stock stories on which the official court stories were based? If the legal strategy employed on her behalf had highlighted the structural inequalities between the parties, if it had challenged the romantic fool/suitor, damned whore/victim stereotypes, would the trial judge¹⁵³ have listened to, understood, and acted upon this counter-story?

We cannot know for sure. But there is an increasing scepticism among adherents of legal storytelling about the potential of counternarratives to change the views and actions of insiders. Reservations have been expressed about the *ability* of judges (in particular) to empathise with outsider groups given that they do not share the same experiences and understandings.¹⁵⁴ It has also been pointed out that because dominant narratives are seen as the 'natural' state of affairs, because they have the power of 'truth', then it is unlikely that counter-narratives will persuade people to think otherwise. They are more likely to generate resistance rather than conversion, particularly amongst those who have a stake in the status quo.¹⁵⁵

This scepticism is well founded. But it should not lead us to unnecessary

¹⁵⁰ See, eg, Delgado, 'Storytelling for Oppositionists and Others', above n 9; Henderson, above n 12; Stephanie Goldberg, 'Who's Afraid of Derrick Bell?: A Conversation on Harvard, Storytelling and the Meaning of Color' (1992) 78 *American Bar Association Journal* 56; Angela Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42 *Stanford Law Review* 581; Williams, above n 3. Fajer, above n 3; Coombs, above n 3; Massaro, above n 13; David Luban, 'Difference Made Legal: The Court and Dr. King' (1989) 87 *Michigan Law Review* 2152; Steven Winter, 'The Cognitive Dimension of the *Agon* between Legal Power and Narrative Meaning' (1989) 87 *Michigan Law Review* 2225; Joseph William Singer, 'Persuasion' (1989) 87 *Michigan Law Review* 2442.

¹⁵¹ Fajer, above n 3, 514.

¹⁵² Delgado, 'Storytelling for Oppositionists and Others', above n 9, 2413.

¹⁵³ Or the judges on appeal.

¹⁵⁴ See, eg, Delgado and Stefancic, 'Norms and Narratives', above n 3, 1930, stating that there is a 'judicial inability to identify, imaginatively, with the persons whose fate is being decided ... because of the particularized stock of life experiences and understandings judges bring to the bench'.

¹⁵⁵ Delgado and Stefancic argue that (ibid 1933):

the saving potential of most counternarratives is much more limited than we would like to believe We are all situated actors, whose selves, imaginations, and range of possibilities are constructed by our social setting and experience Thus, an unfamiliar narrative invariably generates resistance ... [C]ounterstories are likely to effect at most small, incremental changes in the listener or reader [O]ur status as situated actors [also] ... limits the very range of counternarratives.

The same authors continue: 'The self and culture are reciprocally related; but the interaction is powerfully homeostatic. Power-Knowledge replicates itself endlessly and ineluctably': see ibid 1957 (footnote omitted).

Toni Massaro has also questioned the potential to achieve change through words when the change requires changes in power: see Massaro, above n 13. See also Delgado, 'Zero-Based Racial Politics', above n 3.

closure. Lawyers who are committed to the outsider cause need to develop strategies which take advantage of the gaps which exist in the dominant discourse. The telling of outsiders' stories in and out of court might not achieve change overnight, but it may assist in the gradual process of fracturing dominant narratives and creating larger spaces in the gaps which appear. It can also help create a viable opposition through community building and consciousness raising within outsider groups.¹⁵⁶

The Problem With Tran's Story: The Relationship Between Counter-Storytelling and Voice

But where is Mary Louth's voice in all of this? I have implicitly assumed that she would tell her 'outsider story' as Tran told it, based on her 'class-and-gender-sensitive' reading of the trial transcript. But we do not really know what she herself would say. It would be wrong to simply assume that her story would be the same as the story told by Tran.

Tran had available to her only what was said and suggested in the evidence which came out at the trial, as recorded in the trial transcript. This is a very limited source from which to construct a story. The evidence which comes out at a trial is structured by a restrictive process of selection and construction, a process determined by the way the legal issue is framed, by the way in which lawyers structure their clients' cases, and by rules of evidence, particularly those relating to what is 'legally relevant'.¹⁵⁷ It may well be that Louth herself would have included other details in her story, details which could not be gleaned from a reading of the trial transcript because the trial process ensured their exclusion.

More importantly, however, to conflate Louth's own story with the story told by Tran is to impose on her a feminist and class-conscious 'voice' which she

¹⁵⁶ In this context the struggle of outsider groups is clearly not restricted to the legal arena. It can take the form of direct and indirect political action, educational campaigning and so forth.

¹⁵⁷ For a discussion of what lawyers do to clients' stories and the effect that rules of evidence have on the telling of those stories in court, see generally Clark Cunningham, 'A Tale of Two Clients: Thinking About Law As Language' (1989) 87 *Michigan Law Review* 2459; Singer, above n 150; Alfieri, above n 3. See also the discussion above concerning the presentation of Louth's case at the trial.

The trial transcript in *Louth v Diprose* provides an explicit example of the restrictive use to which rules of evidence can be put. When counsel for Louth questioned his client about what she was doing with her life at the time of the trial, the trial judge made him discontinue his line of questioning on the ground of 'relevance' (trial transcript 119):

[Louth:] I work at Daw Park Hospice for the terminally ill ... I am an enrolled nurse there ... I got my nursing qualification in the 60's but I did a refresher course in 1986.

Q. [Counsel for Louth:] How do you feel about working with the terminally ill. WITNESS LEAVES COURTROOM ... DISCUSSION ENSUES HIS HONOUR DISALLOWS QUESTION ON THE GROUND OF RELEVANCE.

This extract shows that Louth may have 'got her life together' despite her difficult past. We get a glimpse of another aspect of her identity, an aspect which could permit a construction of her as compassionate, self-reliant, and self-improving. If this line of questioning was allowed to continue, then it may have been more difficult for the trial judge to have constructed her in the negative and one-dimensional way in which he did. This information also detracts from the minority depiction of Louth as a victim.

This example illustrates how rules relating to 'relevance' can explicitly be used to restrict the information that is available before the courts. At a more subtle level, they may operate to restrict the type of evidence that lawyers even attempt to introduce before the courts.

may not in fact have. Louth may not have perceived or named Diprose's behaviour as sexual harassment or as otherwise threatening; she may even have considered it to be romantic; she may not have been conscious of issues of structural power; and it is possible that she saw herself as a victim, or as undeserving.

This highlights the problems inherent in a strategy and a politics which values the voices of outsiders, but at the same time requires (hopes?) that those voices question the dominant discourse rather than speak directly from it. It also points to the risk we run of using our own positions of relative power to silence the voices of 'others' and to replace them with our own more privileged voices.

This issue has been discussed and debated elsewhere,¹⁵⁸ and I do not intend to resolve it here. I raise it merely as a factor which should be borne in mind in any consideration of the strategies we might employ towards achieving progressive change. It serves to remind us that we need to be vigilant about the effect that our strategies may have on those who we dare to speak for. We need to keep asking, what are the consequences of employing particular strategies for outsider groups and for individual outsiders?

This brings us back to the question: *From Mary Louth's point of view*, how should her defence at the trial have been framed? How (in retrospect) should her story have been told?

Contingent Strategies

I have assumed that the telling of a counter-story (perhaps Tran's story) on Louth's behalf would have been a useful strategy from her point of view as an outsider, because even if it did not convince the court, it would have contributed to the gradual process of fracturing dominant narratives and community building amongst outsiders. But it is important not to lose sight of the fact that from Louth's point of view, a major (if not the only) concern would have been winning the case. To her, it meant the difference between keeping the house and losing it.

This raises the question of whether advocates for outsiders should always employ strategies in court which challenge the stock stories in which their clients are implicated, or whether it is sometimes preferable, indeed necessary, to employ strategies which utilise dominant narratives towards the immediate end of winning the case. Herein lies a tactical dilemma. To collude in the construction of outsider clients in ways which reinforce dominant stereotypes about them may increase their chance of immediate success,¹⁵⁹ but it may also reinforce their negative self-image or injure their self-esteem,¹⁶⁰ as well as

¹⁵⁸ See, eg, Harris, above n 150; Mari Matsuda, 'Pragmatism Modified and the False Consciousness Problem' (1990) 63 *Southern California Law Review* 1763, esp 1777-80; Delgado, 'When a Story Is Just a Story', above n 3; Alex Johnson Jr, 'The New Voice of Color' (1991) 100 *Yale Law Journal* 2007; Randall Kennedy, 'Racial Critiques of Legal Academia' (1989) 102 *Harvard Law Review* 1745.

¹⁵⁹ Presumably these stories would be more readily accepted by judges.

¹⁶⁰ See Jody Freeman, 'Constitutive Rhetoric: Law as a Literary Activity' (1991) 14 *Harvard Women's Law Journal* 305, 311.

reinforce narratives which work against them and other outsiders in other ways.¹⁶¹

In the present context, if Louth's defence was structured in a way which supported the narrative deployed by the minority judges, a narrative which led them to find in Louth's favour, then it might have increased Louth's chances of winning the case. But the construction of Louth as a victim may also have reinforced her feelings of helplessness, and the failure to name Diprose's behaviour as sexual harassment or as otherwise threatening may have left her feeling that her experience had been invalidated. Furthermore, to have achieved a favourable result in this particular case through the construction of Louth as a victim may create a situation in which women who cannot fit this stereotype are denied success in later cases.¹⁶² Finally, the use of dominant narratives in argument reinforces their legitimacy and contributes to their persistence to the detriment of outsiders generally.

Where then, does this leave us? It certainly leaves us without a Grand Theory or Grand Strategy to which we can always turn for the right answer. No one formula will produce the 'best' result in every case. We need to evaluate our strategies from the point of view of what they can achieve in a given case, at a particular point in time; that is, we need to think in terms of *contingent* strategies. In the words of Allan Hutchinson:

The core idea is to act in a guerilla-like way — within a broad set of progressive objectives, to seize the possibilities of any contingent moment in order to achieve judicial decisions that heighten the status quo's contradictions and open up space for lasting political action.¹⁶³

CONCLUSION

In this article I have attempted a critique of *Louth v Diprose* using the methods and insights of legal storytelling. The story I have told has been a bleak one. It has been about the persistence of gender stereotypes and a judicial inability to acknowledge class and gender power. But it has also been about possibilities, the possibilities which emerge when we realise that there is nothing essential, objective, or neutral about the current legal order. This realisation brings with it a responsibility to engage in scholarship which challenges that order. Legal storytelling does just that.

¹⁶¹ See Bottomley, above n 132, 58.

¹⁶² See *ibid.*

¹⁶³ Hutchinson, above n 6, 1568.