

**Griffith**

**Review**

Law Theory Society

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Laura Petersen and  
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# GRIFFITH LAW REVIEW

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## CURATING A MUSEUM OF LEGAL ACCIDENTS

*Jake Goldenfein, Laura Petersen and Marc Trabsky\**

This piece introduces the symposium issue 'Law and Its Accidents'. The issue emerged from the Melbourne Doctoral Forum on Legal Theory, which took place at the Melbourne Law School on 15–16 December 2011. The theme of the symposium responded to two provocations: first, the anxieties to do with accidents of technology such as that surrounding the disaster at the Fukushima Daiichi nuclear power station in Japan in 2011; and second, Paul Virilio's writings on curating a 'museum of accidents', in which he urges us to make space in our museum of technological progress for an equally important museum of the accident. The essential theme of the symposium, which we asked all authors to contemplate, was: 'If law is a technology, then what are its accidents?' We asked this question because we believe that in law the accident never just happens: it is embedded in the techniques, institutions and places of law.

This symposium issue emerged from the Melbourne Doctoral Forum on Legal Theory, which took place at the Melbourne Law School on 15–16 December 2011. The theme of the issue sprang from two provocations. First, when organising the forum in early 2011, we found ourselves confounded by the anxiety surrounding the disaster at the Fukushima Daiichi nuclear power station in Japan. On the news, we witnessed the tsunami waters that drowned the facility, cutting power to the cooling systems and leading to a series of explosions and core meltdowns. The releases of nuclear radioactive material resulted in only the second ever incident to achieve a level 7 (the highest) on the International Nuclear Event Scale.

The first level 7 incident, the Chernobyl nuclear disaster of 1986, was 'resolved' with a colossal 'Object Shelter' containing the primary site of radioactive contamination. Yet this concrete sarcophagus currently requires significant restorative maintenance or replacement – a reminder that the temporal scale of nuclear decay extends far beyond anything humans construct to contain it. In the same way that the Chernobyl disaster still bubbles away under its crumbling concrete tomb, at the time of writing the Fukushima accident continues to generate significant radiological risks. In August 2013, TEPCO acknowledged that a significant quantity of

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## TELLING STORIES FROM START TO FINISH

### Exploring the Demand for Narrative in Refugee Testimony

Anthea Vogl\*

When someone seeking refugee status comes before a departmental officer or administrative body, the applicant's first-person testimony plays a crucial role since there is often little or no other evidence – such as documents or witnesses – to support the claim being made. The distinctly narrative form of refugee applicants' evidence, and its central place in the status determination process, make such testimony an ideal site from which to explore the law's relationship with narrative. In this article, I use one Refugee Review Tribunal decision to exemplify how demands for narrativity, in relation to both the content and form of evidence, influence determinations about the plausibility of refugee testimony. I argue that part of the law's requirement for 'plausible' evidence involves an expectation that refugee applicants tell a good story – that is, one that predominantly conforms to the conventions of model narrative forms. When the law responds to the events and accidents within refugee testimony, narrative expectations are at play – and the precise terms of these standards and the content of 'good', orderly narratives are implicit, shifting and inconsistent.

'Can you tell me when it all began? Can you just go back to the beginning?'<sup>1</sup> These are the opening lines of *A Well Founded Fear*, a documentary in which the directors sought and gained unprecedented access to the offices of the former Immigration and Naturalisation Service (INS) in the United States, and filmed the confidential first-instance interviews of refugee applicants with US immigration officers. These lines were spoken by an immigration officer to a refugee applicant in the course of an INS interview.

There is something in the tone of the immigration officer when you watch the film that indicates there has been a long and confusing series of exchanges before this. When the officer asks the unidentified female applicant to 'just go back to the beginning', we get the sense that the

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\* Quentin Bryce Scholar and teaching fellow, UTS Law. This research was undertaken as part of a joint PhD at the University of Technology Sydney and the University of British Columbia, and funding for conference attendance was provided by the UTS doctoral program. The author would like to thank Jenni Millbank, Honni van Rijswijk, Catherine Dauvergne and Jemima Mowbray for their generous feedback and encouragement at every stage of this research, as well as the participants at the Melbourne Doctoral Forum on Legal Theory at the University of Melbourne (December 2011) and the three anonymous reviewers of the piece.

<sup>1</sup> Camerini and Robertson (2000).

applicant has already tried to start from the beginning, but the story was not clear enough – or indeed, ‘from the beginning’ enough – or that the officer wants her to go back further or to start somewhere else.

When people seeking refugee status come before departmental officers or administrative bodies, the story told by the applicant plays a crucial role in his or her claim, since there is often little or no other evidence – such as documents or witnesses – to support the claim being made. The evidence presented by refugee applicants frequently takes the form of bare first-person testimony, conveyed in a distinctly narrative form. As Matthew Zagor puts it:

the refugee has long been in a situation where protection depends upon the telling of one’s story. Whether she wants to or not, a refugee must speak; and they must speak in a legal context and, preferably, a legal idiom ... speech is a precondition of recognition, protection, and, crucially, legal status.<sup>2</sup>

The distinctly narrative form of refugee testimony, and its central place in the determination process, make the assessment of refugee applicants’ first-person evidence an ideal site from which to explore the law’s relationship with the narrative form, and in particular its demand for narrative in relation to certain kinds of testimony. I argue that part of the law’s requirement for ‘plausible’ evidence involves an expectation that refugee applicants tell a good story – that is, one that predominantly conforms to the conventions of model narratives. Refugee stories must have narrative qualities, and certain substantive narratives and narrative forms tend to be demanded over others. The problem with these demands for narrativity is that neither a refugee applicant’s experiences (life as lived), nor the person’s subsequent accounts of them (life as told), can necessarily meet these expectations.<sup>3</sup>

Scholars from a range of disciplines have critiqued the ways in which decision-makers assess the evidence and credibility of refugee applicants throughout the refugee status determination process.<sup>4</sup> Exploring how the assessment of refugee evidence is influenced by standards applied to good (or bad) narratives, and looking for where such standards are used to discount, discredit or accept evidence, provides another set of questions that shed light upon the appraisal of first-person testimony in adjudicative settings. The Australian Refugee Review Tribunal (the tribunal) is one site where a refugee applicant is expected to present oral, narrative-based evidence, and in this article I use one particular tribunal decision to exemplify how demands for narrativity, in relation to both the content and form of evidence, influence determinations about the plausibility of refugee testimony.

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<sup>2</sup> Zagor (2011), pp 2–3.

<sup>3</sup> Eastmond (2007), p 249. See also Berg and Millbank (2009), p 197.

<sup>4</sup> See, for example, Rousseau et al (2002); Baillet et al (2009); Kagan (2003); Noll (2005); Millbank (2009a, 2009b); Cohen (2002); Kneebone (1998); Ramji-Nogales et al (2009).

In assessing the factors affecting the assessment of refugee testimony and its narrative qualities, there is very little that is 'by design' in the refugee-determination process. Instead, a series of events and circumstances arise by accident. There is the accident of the decision-maker before whom the applicant appears, the accident of that decision-maker's unique perception of reality, and the accident of the decision-maker's interpretation of the applicant's words and actions. In regards to the narrative qualities of the applicant's evidence, there is the accident of the story the decision-maker wants to hear, and the arbitrary points at which a decision-maker believes the story should begin and where it should end.

The article explores the above questions in three parts. It begins by surveying the basic concerns and questions of narrative theory and outlining what narrative analysis contributes to a critique of the law's acts of interpretation. I then provide a brief background to the Australian tribunal, as an administrative avenue of review, and look at the nature of hearing that takes place there. Finally, by examining one tribunal decision, I explore how the presence or absence of narrative qualities and the expectation of particular kinds of narratives play a part in the assessment of refugee testimony.

The refugee testimony examined in this article includes an accidental encounter. The encounter is presented by the applicant as occurring 'by accident' and by implication as an unlikely event. Judging the testimony against conceptions of plausibility and implausibility, the decision-maker must chart the relationship between the accidental, the unlikely and the plausible. In exploring the role of the accident with narratives, I ask how the law responds to, and in certain instances recoils from, that which is 'by accident', unexpected or out of step with stock stories. I argue that when the law responds to events and accidents within refugee testimony, narrative expectations are at play – but that the precise terms of these standards and the content of good, orderly narratives are implicit, shifting and inconsistent. Insofar as these standards are often arbitrary or unarticulated, they have the potential to be invisible to both the applicant and the decision-maker.

### **Background: Narrative Theory as Methodology**

The narrative of narrative theory is defined in a range of ways and across of a range of disciplines. Peter Brooks, writing at the intersection of law and literature, claims that narrative is our literary sense of how certain stories go together, and our expectations of their beginnings, their middles and their ends.<sup>5</sup> Patricia Ewick and Susan Silbey describe narrative as a sequence of statements 'connected by both a temporal and moral ordering', which 'depend for their production and cognition on norms of performance and content'<sup>6</sup> such that social norms and context establish what constitutes a 'successful' narrative.<sup>7</sup> Often, scholars compare the narrative form to a range

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<sup>5</sup> Brooks (2005), p 415.

<sup>6</sup> Ewick and Silbey (1995), p 198.

<sup>7</sup> Ewick and Silbey (1995), p 207.



of other non-narrative forms, in order to effectively reveal what distinguishes or defines a narrative.<sup>8</sup>

Contemporary narrative theory is marked by claims that narrative is ‘everywhere’, that it is ‘bound up with power, property and domination’, and that we not only tell stories but that they ‘tell’ and constitute us.<sup>9</sup> Narrative theorists have observed the tendency for narrative ‘to cover a wider and wider territory, taking in ... an ever-broadening range of subjects for inquiry’, moving from its original home in literary studies to, among other places, history, politics, film, art, law and medicine.<sup>10</sup>

Scholarship addressing the role of narrative *within the law* typically has been seen as belonging to the broader field known as ‘law and literature’, and particularly to scholarship treating law *as* literature, using the concepts and tools of literary criticism to analyse legal texts.<sup>11</sup> This work has focused on narrative in diverse ways, including by arguing that stories told by or about marginalised or ‘outsider’ groups are powerful tools for challenging the law’s exclusion of these perspectives,<sup>12</sup> by exploring the role of narrative in acts of legal interpretation and the construction of legal rhetoric and by critiquing the narratives about law relied upon to legitimise power and control.

Narrative theory as an approach in law has been unified by the claim that the narrative form is a useful tool when exploring how the law constructs meaning and authority. These applications of narrative theory have treated legal texts as legitimate subjects of literary criticism, and have taken up the claim that the ‘narrativity of the law needs analytic attention’.<sup>13</sup> They interrogate how the narrative form reorganises stories ‘to give them a certain inflection and intention, a point’.<sup>14</sup>

Yet what narrative *is* has at times been taken for granted by legal academics seeking to put narrative to work.<sup>15</sup> In such scholarship, narrative typically has been defined in an oppositional mode, as ‘not legal argument’ or ‘not abstract reasoning, and as associated with the specific, the personal and the contextual.’<sup>16</sup> This binary approach has not been readily accepted within scholarship produced by narrative theorists, where the content,

<sup>8</sup> For example, Hayden White (1987) compares narrative-based histories to annals and chronicles, which he argues are (to varying degrees) non-narrative forms. Bruner (1986) uses syllogistic statements as his non-narrative examples.

<sup>9</sup> Bennett and Royle (1995), p 41. See also McQuillan (2000), p 4.

<sup>10</sup> Phelan and Rabinowitz (2005), p 2.

<sup>11</sup> See generally both introductions in Brooks and Gewirtz (1998), pp 2–22.

<sup>12</sup> See Delgado (1989). For a critical perspective, see Razack (1998), p 36.

<sup>13</sup> Brooks (2005), p 415.

<sup>14</sup> Brooks (1998), p 17.

<sup>15</sup> For example, the relationship between ‘story’ and ‘narrative’, used interchangeably in legal scholarship, is a vexed issue within narrative theory: see McQuillan (2000), pp 3–6. See also Balkin and Levinson (2006).

<sup>16</sup> See, for example, Gewirtz (1998), p 135.

definition and history of narrative are subjects of inquiry and debate; these debates are useful when seeking to understand what the demand for narrative forms within the law might entail.

Although I argue here that an expectation of coherent narrative forms directly influences the assessment of refugee testimony, settling on what constitutes a narrative in any context is a vexed a issue.<sup>17</sup> A precise definition of the narrative form is particularly difficult to settle on when attempting to answer the threshold question of ‘When is a text not a narrative?’ Interrogating standard definitions of narrative, Martin McQuillan critiques the place of the novel as ‘paradigmatic of all narrative production’, particularly within ‘theories of narrative’, writing that ‘reliance of narrative models upon the form of the novel is a consequence of the discipline of narrative theory’s beginnings within departments of literature in the French, and later Anglo-American academy’.<sup>18</sup> In contrast to definitions drawn from ‘model’ narrative forms, McQuillan argues that narrative is any minimal linguistic act that depends for its meaning on an intersubjective use of language. In this way, he proposes that ‘pass the salt’ may be considered to be a narrative, since it depends on context for its meaning and involves an intersubjective experience with ‘events existent in a chain of temporal causality or at least contingency’.<sup>19</sup>

Reconsidering the definition of narrative in this manner provides a way to consider ‘unconventional’ narratives as narratives nonetheless – and allows us to ask questions about the *kinds* of narrative that are demanded of particular legal subjects. It also reveals those aspects of narrative that belong to ‘model’ narrative forms as opposed to less standard narratives. For example, literary authors – who deliberately disrupt orthodox narrative structures as a story-telling device – are nonetheless producing narratives even if they are non-linear or disorienting ones. A range of linguistic acts may fall into the category of narrative but, as McQuillan argues, there are still certain narratives that are held up as model forms, and such narratives carry weight by virtue of their status as standard narratives. These model narratives guide expectations in a range of cultural settings and, as I argue here, continue to play a role in the refugee hearing.

Ewick and Silbey, focusing on the components of narrative forms, articulate three core elements that constitute ‘successful’ narratives. These include, first, some form of selective appropriation of past events and characters; second, a temporal ordering of the events within the narrative; and third, that characters and events are related to one another and to some over-arching structure, ‘often in the context of opposition or struggle’, a criterion that might otherwise be called a plot. While these criteria are not exhaustive, I use them as a useful starting point to frame the analysis that follows.<sup>20</sup>

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<sup>17</sup> McQuillan (2000), p 4.

<sup>18</sup> McQuillan (2000), p 9.

<sup>19</sup> Chatman (1990); McQuillan (2000), p 8.

<sup>20</sup> Ewick and Silbey (1995), p 200.

Narrative analysis as a method asks more than what is and is not a narrative. It also questions how and why certain stories are compelling and plausible and others are not. It is in this questioning mode that narrative analysis proves a useful device by which to understand the assessment of plausibility and truth in refugee testimony, particularly when we adopt a flexible and contextual understanding of what 'narrative' might mean in particular legal and cultural frameworks. Exploring how a demand for narrative influences the reception of testimony involves examining why certain stories are deemed to be compelling and the ways in which actors 'rely on narrative forms in interpreting and making sense of their worlds'.<sup>21</sup>

The search for plausible narratives in refugee testimony often involves applying a set of norms or assumptions to the applicant's testimony that correspond with contextually specific expectations about how that person would or should behave and how certain things take place. In adjudicative spaces, narratives that meet the standard of plausible narratives often correspond with 'stock stories', which Brooks defines as common, culturally accepted and sanctioned stories about how and why things function in the world.<sup>22</sup> These stock stories operate by way of unrecognised assumptions, procedures and language, or what Roland Barthes has called *doxa*, which are sets of unexamined cultural beliefs that structure our understanding of everyday happenings.<sup>23</sup> Such *doxa* and stock stories not only constitute our understanding of the day to day; they seek to establish 'the way things are supposed to happen'.<sup>24</sup>

In determining which stories are 'stock stories', context and location are critical alongside content. Certain stories will be comprehended and sanctioned in certain circumstances, but not in others. And, as noted in range of important scholarship on storytelling and the law, stories that are sanctioned frequently reflect the points of view of those with the power to tell their stories, and exclude the voices of those without such power and whose accounts of the world query and disrupt the status quo.<sup>25</sup> These norms of context, performance and content specify when, what, how and why stories are told. Thus successful narratives must not only evince Ewick and Silbey's criteria in relation to their form and content; their success also depends on a range of normative cultural expectations determined by the setting in which they are told and the purpose for which they are narrated.

## A Brief Background to Refugee Determination In Australia

The particular setting under examination in this article is the Australian Refugee Review Tribunal. The tribunal is one of a range of sites where

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<sup>21</sup> Ewick and Silbey (1995), p 202.

<sup>22</sup> Brooks (2005), p 415.

<sup>23</sup> Barthes (1986), pp 56, 58

<sup>24</sup> Brooks (2006), p 11.

<sup>25</sup> Delgado (1988–89); Lane Scheppele (1988–89); Williams (1991). See generally the special edition, Symposium: 'Legal Storytelling' (1988–89).

refugee applicants present their stories in order to be granted protection, and its decision-makers both create and then apply narrative-based expectations to refugee applicants' oral testimonies. The tribunal hearing, where oral evidence is presented, functions as a fairly standard avenue of administrative review. When onshore refugee applicants make an initial claim for protection in Australia, they must submit an application to the Department of Immigration and Citizenship (the department), where a departmental delegate considers and decides the claim. The applicant, who may be granted an oral interview with the delegate at this stage, is informed of the outcome by letter and given brief reasons for the decision – none of which is publicly available.

If the original application is not successful, an applicant may choose to appeal to the tribunal, which conducts an independent, *de novo* review of the application. The tribunal, conducting full merit-based review, has access to the department's earlier findings but is not bound by them. In most cases, the applicant is invited to an oral hearing at a tribunal registry, and it is the presentation and assessment of testimonial evidence at this stage that I examine in this article.<sup>26</sup>

The purpose of the tribunal, according to its enabling Act, is to provide a mechanism of review that is 'fair, just, economical, informal and quick'.<sup>27</sup> This combination of objectives – to provide review that is both *fair and fast* – places the hearing in a justice/efficiency matrix, which aims to give the applicant a 'fair' hearing at the same time as ensuring the tribunal operates as efficiently (and economically) as possible. Making 'justice' efficient was one of the factors motivating the tribunal's creation, and with it the introduction of the right to a formal hearing and *de novo* review. The introduction of the right to an oral hearing certainly sought, among other things, to 'appeal proof' decisions, and thereby reduce the number of decisions being reviewed and potentially overturned by the courts. Gerry Hand, the Minister for Immigration at the tribunal's inception, stated that 'credible independent merits review will ensure that the Government's clear intentions in relation to controlling entry to Australia ... are not eroded by narrow judicial interpretations'.<sup>28</sup>

While a right of appeal lies from the tribunal to the Federal Court, only questions of law are appealable and, as many have noted, the grounds of appeal have been restricted by a range of reforms passed in order to limit the judicial review of refugee determinations.<sup>29</sup> This means that all factual findings (not involving an error of law) are finalised at the tribunal stage by a single member, presiding over an oral hearing that is 'not bound by

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<sup>26</sup> If a positive decision can be made 'on the papers', the application does not need to proceed to an oral hearing: *Migration Act 1958* (Cth), s 425. Unlike Migration Review Tribunal hearings, all hearings of an application for review by the tribunal 'must be in private': *Migration Act 1958* (Cth), s 429.

<sup>27</sup> *Migration Act 1958* (Cth), s 420.

<sup>28</sup> Hand (1992), p 2620.

<sup>29</sup> See, for example, Crock (2004); Sackville (2004); Spijkerboer (2005), p 89.

technicalities, legal forms or rules of evidence'.<sup>30</sup> The tribunal's assessment of the applicant's evidence and its narrative qualities is therefore crucial, since its fact-finding process is not subject to further review. The creation of a 'right' for the applicant to present their story orally, through the establishment of a nominally independent avenue of review, also created a non-judicial body that had the power to test evidence and make final findings of fact.

In handing down decisions, tribunal members may give a more or less substantive account of the hearing in their written reasons. For the most part, the member's fragmented and highly selective written account of these hearings is the only document that may be made publicly available.<sup>31</sup> The precise format of the hearing varies from decision-maker to decision-maker, but the hearings are inquisitorial in nature and, critically, it is the applicant who must present their testimony as well as answer any questions the tribunal member may have about the claim.<sup>32</sup> Audrey Macklin, a migration law scholar and former sitting member of the Australian tribunal's Canadian equivalent, candidly describes the corresponding process in Canada, writing: 'A claimant/applicant comes before us, tells us a story, furnishes what particulars and corroborating evidence she can, and we ask some questions.'<sup>33</sup>

### **Refugee Review Tribunal Decision 1007136 of 2011.**

I turn now to one tribunal decision, 1007136 of 2011, to examine the ways in which a demand for narrative influenced how the testimony of the refugee applicant in this instance was assessed. The decision concerns a forced marriage claim made by a female applicant from Zimbabwe. My retelling of her story is drawn from the RRT decision-maker's retelling of the applicant's narrative in the written reasons, and therefore may bear little resemblance to the claim as it was made during the hearing.

The applicant was the unmarried youngest child of seven children. At some point in 2006, her paternal aunt and her aunt's husband came to visit the applicant's village. While in the village, her aunt's husband died mysteriously. This death was, and remained at the time of the hearing,

<sup>30</sup> *Migration Act 1958* (Cth), s 420.

<sup>31</sup> The Tribunal's Annual Report of 2009/10 stated that 54 per cent of decisions are published – significantly more than the target of 40 per cent set by the tribunal, but far less than the 100 per cent of decisions formerly published by the tribunal: Migration Review Tribunal and Refugee Review Tribunal (2009–10), p 25; see also Berg and Millbank (2009), Appendix.

<sup>32</sup> The publicly available tribunal decisions show that most decision-makers take advantage of the oral hearing to test the applicant's evidence, as well as to fulfil the statutory requirement that the applicant be given an opportunity to respond to any determinative adverse inferences that may be made against them (rather than inviting written submissions): *Migration Act 1958* (Cth), s 424AA.

<sup>33</sup> Macklin (1998), p 134 (referring to the Canadian Immigration and Refugee Board, as it then was).

unexplained. In order to compensate for this death, which occurred in her family's village, and to appease the avenging spirits, her father and the head men of each village decided that the applicant – as an unmarried young woman – would be given to the deceased man's village to marry Mr C, a middle-aged relative of the deceased man. The applicant did not want to be forced to marry Mr C and attempted to escape this fate by running away. Her father tracked her down; she was beaten and punished, and then prepared for marriage. In early 2009, the family began the journey to the other village to deliver her to the deceased man's family. During the journey to the village, she told her family she needed to go to the toilet and then escaped. She reported that after dark she came upon a Roman Catholic Church, where she told the priest who resided there her story and he allowed her to take sanctuary. A series of events, including a visit to South Africa, took place between this time and her arrival in Australia some months later on a student visa in September 2009. She applied for a protection visa in April 2010 and her initial application was rejected.

The tribunal also rejected her application for review. It found her not to be a 'witness of truth', and found the story to be entirely fabricated. It determined that she had not been estranged from her family because of her refusal to enter into an arranged marriage. It did not accept that she had been required to marry the man in question, and therefore did not accept she may face persecution for a Refugee Convention reason. To demonstrate how the applicant's claim failed to satisfy the requirements of a 'good' story, I follow Ewick and Silbey's three definitional criteria of narrative, outlined above. I explore how her evidence was judged by evaluative modes that are problematic insofar as they are implicit, onerous and shifting.

### *The Selective Appropriation of Past Events and Characters*

Law and narrative scholars have long argued that deciding what is in and what is out – in both fictional and non-fictional narratives – is an active and deliberate process of narrative construction, and that these decisions are neither self-evident nor settled.<sup>34</sup> Recognising the role of narrative in giving meaning to events involves recognising which details we normatively deem to be relevant to a particular story, or conversely, which are deemed irrelevant and as belonging to a different story. Such determinations involve unacknowledged sets of beliefs, which are presented as natural, or as common sense.<sup>35</sup>

Denying the deeply contextual nature of narrative construction, it is common for the truth of a refugee applicant's story to be undermined or rejected because of the applicant's failure to include or remember a specific incident or detail from the outset, and to first mention this at a later stage of the application. In terms of narrative construction, this demands that certain

<sup>34</sup> Brooks (2005), p 424.

<sup>35</sup> Brooks (2005). For the extent to which that 'common sense' is raced, gendered and classed, and excludes minority voices, see Symposium: 'Legal Storytelling' (1988–89). See also Graycar (1995).

details must be selected for inclusion if the story is to be considered true. It also assumes that applicants make absolutely comprehensive initial statements of their claim and that subsequent statements can be productively compared with the initial claim.<sup>36</sup> In the course of making her claim, the applicant mentioned for the first time during her RRT hearing (not on her initial application form or at her initial interview with a departmental delegate) that the mysterious death of her aunt's husband was not an isolated incident, and that 'she [had] lost various family members without explanation [and that it] was hard to comprehend so many deaths in the family'.<sup>37</sup>

In the written reasons, the decision-maker states that 'the Tribunal informed the applicant that it seems quite an important matter that there were other deaths, and yet she did not mention it before'.<sup>38</sup> The tribunal member then goes on to note four more times in the decision that the applicant did not mention these other mysterious deaths at the outset. When asked by the tribunal member why she did not mention the numerous deaths in her village earlier, the applicant explained that 'the terminology could only be explained in [her] traditional language Ndebele', and that the first time she had had an Ndebele interpreter present was at her tribunal hearing. She stated that she did not have the terminology to explain the phenomenon of the multiple deaths in plain English, and could not describe these deaths and their causes without an interpreter.<sup>39</sup> In response to this, in the 'Findings and Reasons' section of the decision, the tribunal member had this to say:

The applicant claimed that she lost various family members without explanation and it was hard to comprehend with so many deaths in the family ... The Tribunal does not accept this evidence and is satisfied that if these events took place that the applicant would have given evidence of them ... The Tribunal does not accept the applicant's explanation that at the time she did not know exactly how to go about it and put it into words.<sup>40</sup>

What is striking about the above finding is not only that the Tribunal member does not interrogate the applicant's evidence that she lacked an interpreter at the first interview, preventing her from presenting all elements of her claim. It is also that the tribunal member is so unequivocal and certain that the applicant should have included the other mysterious deaths in her narrative *from the very beginning*. The definition of a refugee, as set out in the Refugee Convention and in Australian law, requires the applicant to show she has a well-founded fear of persecution on the grounds of her race,

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<sup>36</sup> Millbank (2009b), pp 11–15.

<sup>37</sup> 1007136 [2011] RRTA 140 (14 February 2011), para [166].

<sup>38</sup> 1007136 [2011] RRTA 140 (14 February 2011), para [175].

<sup>39</sup> 1007136 [2011] RRTA 140 (14 February 2011), para [175].

<sup>40</sup> 1007136 [2011] RRTA 140 (14 February 2011), paras [278] and [280].

religion, nationality, political opinion or social group.<sup>41</sup> The determination of whether an applicant has a well-founded fear of persecution is forward looking, but in order to show the ‘well founded-ness’ of this fear, the decision-maker or court frequently directs its inquiry to the applicant’s direct past experience or the experiences of those similarly situated to the applicant. The applicant must show that, on account of evidence available, she personally fears harm based on a Convention ground.

The detail of the other mysterious deaths is, on one view, entirely peripheral to the narrative demanded of the applicant by the relevant legislation. In taking an alternate approach from the tribunal member’s to the applicant’s story, one might observe that there were many mysterious deaths in the village, but that only one related directly to the applicant’s claim. Following this approach to the narrative, the string of mysterious deaths is not relevant to the applicant’s own well-founded fear of being forced to marry, which was the primary basis of the claim. It is not evident from the written decision that the tribunal member asked whether the other deaths had also given rise to forced marriages, which – on this reading – may be one way to render the other deaths directly relevant to the applicant’s own claim of persecution.

Despite the obvious narrative choices involved in determining whether these further deaths are part of the story, the applicant’s failure to include the other unexplained deaths in this already mysterious tale proved to be one of the key bases upon which her evidence was rejected in its entirety. The tribunal member’s view, that the applicant’s original omission of this particular detail was a critical error, is certainly not the only view. The multiple approaches that could be taken to the relevance of the further deaths show that the question of what is necessary, versus what is contingent in narrative, is not settled. Yet the fixed narrative expectations of the decision-maker had enormously significant consequences for the applicant – even though they were frequently invisible to her, as much as they may also be invisible to refugee decision-makers themselves.

As a result, what is important to the story in this example becomes the tribunal member’s capricious sense of what is important, which not only contradicts but also dismisses the applicant’s sense of her own narrative and how best to construct it. When an applicant’s evidence is undermined on the basis of leaving something out, as it was here, the tribunal member denies the active and individual process of narrative creation (if this all really happened, how could the applicant *not* have mentioned that) and indulges the fantasy that the applicant is able to tell the delegate/tribunal ‘everything’. At the same time, the decision-maker is demanding a particular set of narrative choices, different from those that have been made by the applicant.

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<sup>41</sup> *Migration Act 1958* (Cth), s 36. For the Convention definition of a refugee, see *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150, Article 1. See also Goodwin-Gill and McAdam (2007), especially Part 4, ‘The Refugee Definition and the Reasons for Persecution’.



The expectation that the applicant will tell the decision-maker ‘everything’ from the outset to gain protection recalls Gregor Noll’s argument that evidentiary assessment in refugee status determination can best be understood in comparison to Roman Catholic auricular confession practices, and as related to rituals of confession, repentance and absolution.<sup>42</sup> Comparing processes of asylum determination with confession, Noll notes that the refugee applicant ‘must be prepared to impart any kind of information’, whether about travel route, identity or details of the protection claim, and that ‘[w]ithholding information, delivering it piecemeal, in a strategic manner, or in a contradictory fashion’ may be fatal to the claim.<sup>43</sup>

Refugee applicants – like penitents – are often in unique positions as storytellers, since it is not uncommon for them to be telling their story or parts of their story for the first time when making a claim for refugee status. Jenni Millbank and Laurie Berg refer to a United Kingdom study where three-quarters of respondents reported that they had talked about their ‘history of pre-migration trauma’ for the first time during the refugee intake process.<sup>44</sup> This has significant implications for how stories are told, and what is and is not included. Determining how a particular story should be told is just as much a process of trial and error (telling and re-telling the story), as it is a deliberate or settled recounting of certain events.

Examining the personal narratives of lesbians and gay men in particular, Millbank and Berg note that, due to shame, some gay and lesbian refugee claimants ‘have talked to only a handful of people, or none at all, about their sexual orientation prior to making a refugee claim’.<sup>45</sup> There are obvious and extreme challenges that come with trying to piece together a coherent story about anything for the first (or even the fourth or fifth) time during an interview with a government officer, let alone when giving accounts of trauma or past harm. A refugee applicant must not only create a narrative addressing trauma, but will frequently be called to account for why certain details were left out and then later included, or conversely included and then later left out. These are remarkably high standards of narrative construction for an applicant to meet.

Cathy Caruth draws on Freud’s use of a train accident to illuminate the experience of trauma and its effects on those who experience it. She writes that an accident is an exemplary scene of trauma, since it represents the violence of a collision as well as its incomprehensibility:<sup>46</sup> the event itself and ‘the peculiar and perplexing experience of survival’ cannot fully be grasped.<sup>47</sup> The incomprehensibility that characterises both the accident and the trauma that follows relates in turn to the inexplicability of certain events. In considering

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<sup>42</sup> Noll (2005b), p 197.

<sup>43</sup> Noll (2005b), p 200.

<sup>44</sup> Bogner et al (2007), p 78; Berg and Millbank (2009), p 201.

<sup>45</sup> Berg and Millbank (2009), p 198.

<sup>46</sup> Caruth (1996), p 6.

<sup>47</sup> Caruth (1996), p 60.

the effects of trauma on refugee narrative, where certain events are identified as being difficult (or impossible) to narrate, Caruth alerts us to the possibility that they have never been fully comprehended at all.<sup>48</sup>

In addition to these factors, by the time the tribunal makes its findings, applicants generally have been required to articulate their stories in detail at least three times for the purposes of the claim, bringing at least three versions of the story into circulation: one on the application form; another in the initial interview; and then a version told in the tribunal hearing itself, which may be accompanied by a further statutory declaration supporting the application for review. In the written reasons of decision 1007136 of 2011, the tribunal member records three separate versions of the events that comprised the applicant's claim: one under the heading 'Claims made to the Department', which includes the applicant's statement; one drawn from 'the applicant's statutory declaration'; and a third under the heading 'the Tribunal hearing'. Meticulous comparisons between these accounts are based on an understanding that people conveying 'true' stories will tell the same story each time it is reproduced, and that that every inclusion or exclusion is by design, not by accident – an assumption that has been widely critiqued by refugee law scholars amongst others.<sup>49</sup>

The other mysterious deaths were not necessarily details critical to the applicant's substantive claim, or to the story demanded by the law. Yet the tribunal member held that the failure to include these details from the start cast the applicant's entire story into doubt. It is worth briefly considering on what grounds these deaths could be cast as crucial to the claim. When reading the decision, one gets the sense that the multiple mysterious deaths are so strange and so sensational to the tribunal member – in her specific and ethnocentric frame of reference – that the member could not comprehend their omission from the evidence. Perhaps, for the member, they were the central intrigues or drama around which the rest of the story should have unfolded. Avenging spirits! Mysterious deaths! As both extraordinary and inexplicable to the cultural and social context of the decision-maker, these deaths are not just relevant but crucial to the construction of the story at hand. On the basis of the tribunal member's repeated questions as to why this detail was omitted, it seems sensible to conclude that if she were telling the story, this would be the point around which the arc of the plot was built.

### *Temporal Ordering*

The ordering of events is crucial to assessments of what constitutes a good or successful narrative. While narratives may not need to be told in a chronological manner, the events within good narratives are expected to occur in a manner that 'makes sense'. The events must be ordered, and with

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<sup>48</sup> This recalls Elaine Scarry's claim that extreme pain is ordinarily bereft of the resources of speech and language, since such pain not only resists precise language but actively destroys it: Scarry (1985), pp 4–6.

<sup>49</sup> Crépeau and Nakache (2008), pp 105–9; Kagan (2003), pp 388–89; Herlihy et al (2002), pp 324–27.

the expectation of order within narratives comes a requirement for beginnings, middles and ends. Unavoidably, refugee applicants are required to begin and end their testimonial evidence at some point, and the decision about where the story begins and ends confines and determines what the story is about.

A recurrent issue in the determination of refugee claims is the question of when – that is, at what point – the applicant left his or her country and sought refugee status, and whether the timing of this choice is consistent with the story of persecution upon which the claim is based. The common expectation is that flight from a country of origin is a direct response to persecution, and that when protection becomes available, it will be sought immediately. As Millbank rightly points out, ‘a fundamental but untested assumption of refugee adjudication is that claimants in genuine fear of persecution will make their claim at the earliest possible opportunity and as fulsomely as possible’.<sup>50</sup> Thus the ordering of these particular events by the applicant becomes crucial – and any sense of a haphazardness or disorder to the sequence of events is often cited as evidence of the implausibility of the story.

In Aristotle’s short work *The Poetics*, often described as the first work of literary criticism, he draws together what he believes to be the essential elements of a successful tragedy. He writes that one essential feature of tragedies is that they have a beginning, a middle and an end, or an ‘ordered arrangement of incidents’.<sup>51</sup> Then, in a rather circular manner, he explains what defines each of these parts:

A beginning is that which does not necessarily come after something else, although something else exists or comes about after it. An end, on the contrary, is that which naturally follows something else either as a necessary or as a usual consequence, and is not itself followed by anything. A middle is that which follows something else, and is itself followed by something.<sup>52</sup>

Aristotle’s explanations, like many descriptions of narrative construction, trust that the audience and authors alike have an agreed sense of which events are connected by clear sequential relationships – and implies a ‘you will know it when you see it’ approach to describing how to correctly ‘order’ incidents in a story. However, there is not one ‘beginning’ in a refugee applicant’s life story ‘that does not necessarily come after something else’. There are many beginnings that could all give rise to many different ‘middles’ and ‘ends’. When an applicant draws these sequences together in an adjudicative setting, he or she cannot necessarily account for the place of each incident within a larger chain of events, or pin down the reasons why a particular course of action was chosen, or point to an obvious ‘end’ to the story.

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<sup>50</sup> Millbank (2009b), p 13.

<sup>51</sup> Aristotle (1965), pp 38–45

<sup>52</sup> Aristotle (1965), pp 38.

In decision 1007136, in the decision-maker's view, the applicant did several things to disrupt the linearity of her persecution claim, and the existence of an uninterrupted causative relationship between the harm she feared and her decision to claim status. The first thing she did was travel to South Africa before her flight from Zimbabwe; the second thing she did was return to Zimbabwe from South Africa, instead of travelling to Australia from South Africa directly. With regard to the applicant's decision to visit South Africa while in hiding from her family, the tribunal found that 'her claim is not credible that in a vulnerable status, having run away from a forced marriage and having found sanctuary, that she would have left that sanctuary and gone for three weeks to South Africa'.<sup>53</sup>

The other apparent temporal 'problem' in the applicant's narrative was that she did not immediately apply for status when she arrived in Australia, but rather waited six months before lodging an application. In her final findings and reasons, the decision-maker disbelieves (or disapproves of) the applicant's narrative in the following terms:

Another concern that the Tribunal has is about the applicant's delay in applying for a protection visa ... When asked why she waited so long the applicant claimed that it was some months after she arrived in Australia that she confided in a friend about what happened to her in Zimbabwe.<sup>54</sup>

In seeking to explain to the Tribunal the timing of events in the story, her decision not to apply for refugee status immediately, and to provide reasons for the relationship between events, the applicant stated that:

it took her some time to open up ... and at first, she thought there was a chance things would change at home ... The applicant claimed that it took her this long because she did not have the information about [the application process] earlier, and was still confused and afraid.<sup>55</sup>

The Tribunal then found that the applicant's delay in applying was 'inconsistent with her claimed fear'.

Here, a series of narrative-based assumptions guide the expectations of the decision-maker. These expectations, about the temporal ordering and content of the applicant's story, are not acknowledged. The decision-maker does not say to the applicant: refugees do not travel to a neighbouring country prior to leaving their country for good because the causative relationship between the harm they face and their decision to flee should be immediate. Nor does the decision-maker say: anyone who genuinely requires protection puts their application in immediately after they arrive in Australia, since they know these options are available to them and they do not delay making their claims.

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<sup>53</sup> 1007136 [2011] RRTA 140 (14 February 2011), para [284].

<sup>54</sup> 1007136 [2011] RRTA 140 (14 February 2011), para [286].

<sup>55</sup> 1007136 [2011] RRTA 140 (14 February 2011), para [286].

Narrativity's demand for beginnings, middles and ends manifests crudely in the refugee story, where the 'middle' is some form of persecution, and the end (which should follow on from the middle in a linear way) is that the person does their utmost to leave and apply for refugee status as soon as possible. Interim arrangements or using one's agency to avert the danger, which may well be *part of the story*, are looked upon – as here – with suspicion. In refugee applicant narratives, one conventional ending is the making (and later determination) of the claim. However, this 'natural' end-point may not appear as such to the applicant, who may still fear return to a country of origin during the application process, or who may choose to appeal or to challenge deportation orders if the claim is unsuccessful, or who sees being granted formal protection as a small event in the bigger story of resettlement and other major life events.<sup>56</sup>

### *Stock Stories and Narrative Arcs*

Finally, I come to Ewick and Silbey's last criterion for narrative: that characters must be related to one another and to some over-arching structure – a requirement often described as plot or emplotment, and commonly identified as the feature that distinguishes literary narratives from other narrative forms.<sup>57</sup> EM Forster writes that whereas in a story or narrative we might ask 'and then?', in a plot we ask 'why?'.<sup>58</sup> Plots are made up of comprehensible causative relationships between events and outcomes, and in literary narratives, a 'good' plot not only demands that events are temporally and causatively ordered, but that these events reveal some kind of 'narrative closure',<sup>59</sup> purpose or 'moral meaning'.<sup>60</sup>

Alongside the expectation of a plot, is the expectation that the plot corresponds with culturally specific stock stories, which privilege and sanction certain narrative events as plausible and as 'truth' over others, and also have particular 'moral meanings' or implications. The story itself must accord with accepted, normative understandings of how events take place and how raced, gendered and classed characters behave and function. The truth of the applicant's story was doubted by the decision-maker on account of its content being 'implausible' in relation to a number of events, one of which was her decision to go briefly to South Africa while she was in hiding from her family. She told the tribunal that although she arrived in South Africa with travellers' cheques, because she did not know how to change them she slept alone in a taxi shelter at a central bus exchange, and that while at the taxi shelter she, by chance, ran into her only friend in South

<sup>56</sup> On the impossibility of complete closure in narrative, see McQuillan (2000), p 5.

<sup>57</sup> Forster (1963), pp 40–42 and 87.

<sup>58</sup> Forster (1963), pp 40–42. Forster tells us that 'the king and then the queen died' is a story, whereas 'the king died and then the queen died because of grief' is a plot – and a gendered one at that.

<sup>59</sup> Ewick and Silbey (1995), p 200.

<sup>60</sup> White (1987), p 11.

Africa. Her friend worked near the taxi shelter and from that point onwards, she stayed with her friend while in South Africa.

The tribunal member, however, concluded that it was not plausible that the applicant went to South Africa:

[T]he Tribunal does not believe [the applicant's] evidence that she went to South Africa ... The Tribunal finds that her claim is not credible that in a vulnerable state, having run away from a forced marriage and having found sanctuary, that she would have left that sanctuary and gone for three weeks to South Africa and stayed in a taxi rank.

The Tribunal member also concluded that, had she gone to South Africa, the applicant would not have stayed in a taxi rank or run into her friend:

The Tribunal does not accept her evidence that she stayed in a taxi rank or that she ran into her friend who happened to go there to catch a taxi ... After all, she gave evidence that she had travellers' cheques and it is not credible that she would not have used her money to find accommodation.<sup>61</sup>

Here we have a situation in which something that is unlikely (or deemed to be unlikely by the tribunal member) is necessarily untrue. One narrative implication is that unlikely things do not happen. Of course, this is not the case. In this instance, the unlikelihood of the applicant going to South Africa, running into her friend and a very gendered suspicion of a woman deciding to sleep alone in a taxi shelter were taken as evidence of the falsity of her story. Simultaneously, the decision-maker does not believe that a woman 'in a vulnerable state' would not simply have cashed her travellers' cheques and found herself accommodation. When asked repeatedly why she stayed in the taxi rank and did not cash her money, the applicant answered that it was her first time in South Africa, that she did not know Johannesburg and that '[t]here were too many taxis at the taxi rank where she was'.<sup>62</sup> Here, the Tribunal member's judgment of unlikelihood comes from a particular frame of reference – in this instance, one that discounts the effects of trauma and perhaps the kinds of 'irrational' or seemingly unusual decisions that one makes in difficult or post-traumatic circumstances.

The decision-maker's decision to reject the applicant's narrative in these instances reveals that stock stories and standards of plausibility are deeply gendered.<sup>63</sup> What might be considered to be a stock story for a male refugee applicant, coming from a particular region with a particular claim, will rarely – if ever – be mirrored by the stock story for a female applicant making a similar claim. When Melinda McPherson and colleagues conducted an interdisciplinary study examining the experiences of female asylum seekers who reported incidents of gender-based persecution in Australia, they noted the way in which women's stories or testimonies were

<sup>61</sup> 1007136 [2011] RRTA 140 (14 February 2011), paras [166], [284].

<sup>62</sup> 1007136 [2011] RRTA 140 (14 February 2011), para [203].

<sup>63</sup> Baillot et al (2009); Millbank (2003); Kneebone (2005).

often marginalised in asylum law on the basis of them being either too normal or too abnormal.<sup>64</sup> Where women's accounts of abuse do not fit stock stories regarding how women do/ought behave, these stories frequently are characterised as 'rare, repugnant, or beyond belief'. These stories are rendered as random and/or idiosyncratic, and their collective qualities are undermined. When stories told by women are socially considered as normal or usual, the fact that they are violations that require remedies is denied and the harm experienced is normalised.<sup>65</sup>

The difficulty with stock stories about how certain subjects do/should behave is that an applicant may be judged by multiple, intersecting 'standard' narratives, each of which applies to different cultural, racial and gendered identities that the applicant is perceived to inhabit.<sup>66</sup> In this particular decision, the applicant is judged against stock narratives not only as they apply to an 'authentic' refugee, but more specifically she is judged as a woman, as a refugee woman, as a raced other and as a raced woman, to articulate a few of the possible constellations.

In asking who is the authentic, imagined subject of gender persecution in refugee law, Sherene Razack writes that she is the 'culturally othered woman', who is most likely to succeed when she presents as the victim of exceptionally patriarchal cultures and states.<sup>67</sup> Imperial and raced stories combine to produce legitimate subjects of persecution, and erase the experience of racialised women seeking protection, and of onshore refugee applicants in general.<sup>68</sup> In this sense, stock stories are built around conceptions of authentic subjects – and decision-makers' shifting assumptions about how such subjects behave.<sup>69</sup>

Let us return to the event in the narrative that is the most apparently 'by accident', and outside of a 'stock story': the applicant chancing upon her friend in South Africa. It is instructive to compare the tribunal member's reaction to this chance encounter with the role of the improbable in fictional

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<sup>64</sup> McPherson et al (2011), p 328, applying Catherine MacKinnon's (2006) analysis of how the law systematically marginalises atrocities experienced by women. The study's application of MacKinnon's work to the asylum process is insightful; however, it is worth noting that the empirical basis of the study and its findings with regard to the practices of the Department of Immigration and Citizenship (DIAC) were critiqued by DIAC in a formal response to the article written by DIAC's National Communications Branch, noting the 'extremely small sample' of data, among other things. See Department of Immigration and Citizenship (2011).

<sup>65</sup> MacKinnon (2006), p 3.

<sup>66</sup> See generally Cheney (1993).

<sup>67</sup> Razack, (1995).

<sup>68</sup> Razack (1995), p 50. For work addressing the question of authentic narratives in relation to particular types of claims, see Dauvergne and Millbank (2010); Oxford (2005); Berg and Millbank (2009).

<sup>69</sup> One example of the authentic refugee's Other is the 'bogus' refugees, often maligned and constructed as entitled 'economic migrants' claiming refugee status or as welfare frauds, once having arrived in the host country: see Pratt and Valverde (2002).

narratives, which often exploit the very unlikelihood yet possibility of certain events as a basis for plot development. Certainly, even in ‘non-fictional’ settings, we do not simply dismiss the accidental or the unlikely as untrue. When people say ‘You’ll never believe who I ran into’, we don’t respond with, ‘No I won’t’ – even if it was a highly implausible encounter.

In dealing with the place of the unexpected in Greek tragedies, Aristotle declares that the best tragedies are not only well ordered but may, by their very structure, give rise to unlikely events that serve to amplify the effects of the tragedy.<sup>70</sup> He argues that chance occurrences that hold some kind of moral meaning (chance by design) will be the most effective in fictional tragedies, arguing that tragedy is the representation ‘of incidents that awaken fear and pity and effects of this kind are heightened when things happen unexpectedly as well as logically.’<sup>71</sup>

Aristotle’s view highlights the fact that events that are ‘out of the ordinary’ or that occur by chance are crucial methods for driving literary plots forward. Mikhail Bakhtin writes that there are certain spatial and temporal points, or *chronoscopes*, in literature where unlikely encounters are especially common.<sup>72</sup> He identifies ‘the road’ as a particularly ‘good place’ for random encounters, since the ‘spatial and temporal paths of the most varied people’ meet at this point. He argues that the road is especially (but not exclusively) appropriate for portraying events governed by chance, and that the narrative of the road is important in the history of the novel and that all the events of some novels either ‘take place on the road or are concentrated along the road (distributed on either side of it)’.

In literary narratives, on or off the road, it is not the presence of pure chance or improbable events that render some narratives unbelievable. Rather, it is a question both of what kind of story it is and whether events that are socially constructed as unlikely are nonetheless compelling and plausible. The applicant in decision 1007136 of 2011 spent time ‘on the road’, and she tried in vain to convey the place of the improbable to the tribunal member. In an explanatory mode, she likened the ‘mysterious deaths’ to other improbable yet possible events, and stated that, for example, someone could ‘be struck by a lightning bolt although there was not a cloud in the sky. A lot of things were inexplicable.’<sup>73</sup>

This explanation is at odds with the tribunal member’s view, whereby plausibility and normative notions of ‘the probable’ are equivalents. Macklin carefully critiques the law’s tendency to think that accidents do not happen, and to equate truth with commonsense assessments of probability. She directly

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<sup>70</sup> Aristotle (1965), pp 38–45.

<sup>71</sup> Aristotle (1965), pp 38–45. Aristotle gives the example of when ‘the statue of Mitys at Argos killed the man who had caused Mitys’ death by falling down on him at a public entertainment’, and writes that ‘things like this do not seem mere chance occurrences. Thus plots of this type are necessarily better than others.’

<sup>72</sup> Bakhtin (1994).

<sup>73</sup> 1007136 [2011] RRTA 140 (14 February 2011), para [176].



undoes some of these assumptions when she writes of her experience as a tribunal member in one particular case:

The claimant insisted that she had arrived in Canada in late November by jumping ship in Halifax. Literally. From a height of about four stories and into the freezing and thoroughly unwholesome ocean waters of Halifax Harbour. I would have had no hesitation in agreeing with my colleague that the scenario was wholly implausible – if not for the fact that the event had been photographed by local newspapers.<sup>74</sup>

## Conclusion

Narrative and narrativity are one facet of law's rhetoric, determining who can speak and on what basis in certain legal forums.<sup>75</sup> In this article, I have attempted to give a sense of the ways in which narrative expectations can frame the assessment of refugee testimony, and have chosen just a handful of moments in one tribunal decision to show how the narrative qualities of an applicant's story formed one of the bases upon which her testimony was heard and judged.

If narrative is understood as a series of events, (more or less) temporally ordered and imparting some kind of meaning, we might imagine that most refugee testimony meets these standards, especially if prepared with some form of legal assistance that guides a refugee applicant in the conventions of testimony in this context. Indeed, it is clear that the applicant in decision 1007136 of 2011 presented *a* narrative. However, her narrative and the terms and manner in which was told were rejected. This propels the conclusion that the applicant was not only expected to present narrative-form testimony, but that the decision-maker demanded a particular kind of narrative, and here the concept of narrative genre may be a useful one in terms of better explaining what kinds of stories refugees must tell and how they must tell them.

Alexandra Georgakopoulou, critiquing the tendency of narrative-based analyses to essentialise and homogenise all narratives as 'one archetypal genre', observes that such analyses rely on a version of narrative narrowly defined as a well-structured story, with a beginning, a middle and an end, building up to a complicating event that is usually resolved.<sup>76</sup> A more detailed investigation of narrative genre within refugee testimony and decision-making could raise important questions about where the conventions for refugee applicants giving testimony come from, and how these conventions relate to existing genres or styles of narration. Indeed, refugees must not only recount events, but must also explain *why* they took certain courses of action over others and explicate decisions contested as 'implausible' by the decision-maker. These demands call to mind the realist

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<sup>74</sup> Macklin (1998), p 138.

<sup>75</sup> Sarat (1999).

<sup>76</sup> Georgakopoulou (2008), p 541.

novel, which relies on an ‘omniscient narrator able to adjudicate the development of the narrative from a beginning to a middle to an end’, and where subjects are ‘knowing, responsible and autonomous’, in full possession of themselves and of their language.<sup>77</sup>

The standards for narrative within refugee testimony, however, do not comport with one narrative genre, nor are they fixed or made obvious to an applicant giving testimony. When refugee testimony is judged on the basis of narrative criteria, the terms and standards to which it is held are not made explicit. They are shifting, changing and accidental. An element of the accident is at play each time certain elements of a story are found to be credible or incredible, just as each detail in each version of an applicant’s story is not necessarily included by design. Yet the law’s encounter with chance and the accidental, as narrated by the applicant, was a distrustful one – and an unlikely event was read as implausible and untrue.

The tribunal member’s assessment of the applicant’s evidence reveals that testimony may be deemed to be less plausible or implausible when it does not conform to a decision-maker’s multiple, deeply embedded and implicit narrative-based understandings of the world. Such understandings demand evidence that conforms to narrative conventions, as well as to normative or stock stories about how and why things occur. A refugee applicant is expected to present largely unchanging autobiographical testimony, where the relationships between events are clear, causative and able to be placed within finite narrative arcs. Neither the lives of refugee applicants nor the retelling of them conform to these narrative conventions, which frame the assessment of testimony and act to determine whose speech and whose lives are true, valuable and worthy of recognition.

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