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Melody Richardson Daily

University of Missouri School of Law, DailyMA@missouri.edu

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Damages as Narrative

Melody Richardson Daily*

Let's begin with a thought experiment. Imagine that the year is 2030 and you are a successful attorney. One day you receive a call from a legal scholar who tells you that she is writing a book about legal education at the beginning of the twenty-first century, and she invites you to contribute a chapter. She explains that your chapter should be twenty to thirty pages long, but that the content is entirely up to you. Because you enjoy writing, you agree to write the chapter.

Now, before you continue reading, stop for a minute and jot down a few notes describing what you would include in your chapter, how you would collect the necessary background information, and how you would organize that information.

As you can see, the possibilities are endless. If you chose to write a personal narrative about your experiences as a law student, you could gather the information by trusting your own memory, by reviewing a journal you kept while you were in law school, or by calling classmates to confirm, correct, or augment your recollections. If you chose to describe the institutional standards of that era, you could search your law school's archives to find student handbooks and course catalogues setting forth graduation requirements, course descriptions, grading standards, and other administrative details. And if you chose to take a broader approach, you might read scholarly articles about the pedagogical debate between those who argued that law schools should teach students the practical skills of lawyering and those who opposed such a trade-school mentality.

I asked you to engage in this exercise to remind you that every piece of writing, whether that writing is Barry Werth's *Damages*,¹ an attorney's letter to a client, or a judge's opinion, begins with a series of choices. Because we usually see only the finished product, with a fixed shape and content, it's easy for us to think of that final text as having been inevitable. But if we want to fully appreciate a book, or any other form of writing, we need to consider all the options available to the writer, pay attention to the choices he or she made, and then decide for ourselves whether those particular choices were effective.

"Why," might you ask, "should I make such an effort to analyze this or any other book? Why can't I simply enjoy reading it?" One answer is that this process should increase, not diminish, the pleasure of reading. A spectator who knows the rules of football, who understands the strengths of each team, and who recognizes the plays being executed enjoys the game far more than an uninformed viewer who wonders why these huge men repeatedly slam into each other. Another reason to learn how the game of writing is played is that you are about to become a professional writer yourself. The typical lawyer probably produces more pages of writing than most novelists; one way to improve our own writing is to notice what works, and doesn't work, for other writers.

We can analyze any piece of writing by considering these four questions:

* Melody Richardson Daily is a Clinical Professor of Law and the Director of Legal Research and Writing at the University of Missouri-Columbia School of Law.

1. BARRY WERTH, *DAMAGES: ONE FAMILY'S LEGAL STRUGGLES IN THE WORLD OF MEDICINE* (1998).

1. What is the purpose of the writing?
2. What techniques does the writer use to achieve that purpose?
3. How successfully does the writer use those techniques?
4. Is the purpose worthwhile?²

I. PURPOSE

I assume that all writers have multiple reasons for writing. Professional writers undoubtedly write with the fervent hope that their work will be published and sell enough copies to enable them to pay their bills. In addition, most writers probably have a variety of complex, unknowable, psychological motives for writing. But a book's purpose is not the same as the writer's motives for writing.

Most writing has one or more of the following purposes: to inform, to entertain, to persuade, or to express. Examples of writing meant primarily to inform include newspaper articles, cookbook recipes, and encyclopedia entries. Writings meant primarily to entertain include movie reviews, humor columns, and most novels on the *New York Times* list of best sellers. Persuasive writings include editorial comments, political campaign speeches, and appellate briefs. Writings intended primarily for self-expression include lyrical poetry, diary entries, and comments posted on blogs.

To find the purpose of *Damages*, we might begin by considering Werth's explanation of why he wrote the book. In "A Note on Sources," Werth states:

I was looking for one medical malpractice case through which to explore the conflict between doctors and lawyers – specifically, one that was about to go to trial At the same time, I was gathering information for a magazine piece about malpractice reform for *GQ*. . . . It was when I met the Sabias, with the intention of writing an abbreviated version of what had happened to them for *GQ*, that the idea for a book-length project about them and their case arose.³

We might also look at the book's subtitle: *One Family's Legal Struggles in the World of Medicine*. While we are not obligated to accept either the writer's statement or the subtitle as proof positive of the book's purpose, let's assume for now that Werth's statement is consistent with a close reading of the book, and that the primary purpose of *Damages* is to inform or educate readers about the plight of one family—the Sabias—caught in the collision between medical, legal, and insurance giants.

Werth's choice of purpose raised additional questions. First he had to select the kind of writing that would best enable him to achieve that purpose—exposition, description, argument, or narration. Although these categories are artificial and overlapping, they are helpful in thinking about organizational structure. Exposition usually has some logical structure—classification, comparison

2. These questions follow the analytical framework described in JAMES M. MCCRIMMON, *WRITING WITH A PURPOSE* (4th ed. 1967). In his chapter on the critical essay, McCrimmon poses these questions: "(1) What does the work set out to do? (2) How does it go about doing this? (3) How effective is the achievement? (4) How significant is the total work in its purpose and achievement?" *Id.* at 219.

3. WERTH, *supra* note 1, at 378.

and contrast, or cause and effect. Description tends to be spatially or temporally organized. For example, a travel writer may first describe the outside of a palace and then describe each room he strolls through. Or a science writer may explain each sequential step in a laboratory experiment. Argument usually includes presenting a position, offering support for that position, and showing the weaknesses of the opposing position. Narration, of course, tells a story.

Although sections of Werth's book are expository or descriptive, the overall organizational scheme is narrative. *Damages* is, at heart, a story about the Sabias.

Once Werth chose to write a narrative, he had still more decisions, which involved the central elements of every narrative—point of view, character, setting, and plot.

II. CENTRAL ELEMENTS AND TECHNIQUES USED

A. Point of View

Point of view in narrative raises the question of who will tell the story. One possibility is to have a first-person narrator, which means that the story is told by one of the participants. Well-known first-person narratives include *The Adventures of Huckleberry Finn* by Mark Twain,⁴ and *My Bondage and My Freedom* by Frederick Douglass.⁵ As you can easily imagine, *Damages* would have been entirely different if it had been written as the story told by any one of the participants such as Donna Sabia, Maryellen Humes, Michael Koskoff, Shannon Sabia, or Dr. Kurt Benirschke. When the narrator is a direct participant, readers expect a limited and subjective version of the events.

The second option is a third-person narrator, the anonymous outsider who somehow knows about events he or she did not witness. We have long accepted this literary convention in fiction. We never ask of our narrator, "Who are you and how do you know what happened to Robert when he was alone in the forest?" In non-fiction, however, we have different expectations. We want to know how the narrator/author became privy to such information. Even if the writer chooses to answer that question, the answer is seldom revealed in the narrative itself. Werth, for example, explains his access in "A Note on Sources" at the end of the book.⁶

If the writer selects a third-person narrator, there are additional choices. Does the narrator function as an invisible eyewitness, a hidden camera that merely records and reports events? Or does the narrator tell the story from the perspective of one of the participants, including only what that person observes, hears, does, thinks, or feels? Or is the narrator omniscient and thus able to know the thoughts of multiple participants? Should the narrator editorialize, adding observations and information beyond what is known by any of the participants?

Werth chooses to make his narrator nearly omniscient by telling the story

4. MARK TWAIN, *THE ADVENTURES OF HUCKLEBERRY FINN* (University of California Press 1985) (1885).

5. FREDERICK DOUGLAS, *MY BONDAGE AND MY FREEDOM* (John David Smith ed., Putnam Books 2003) (1855).

6. WERTH, *supra* note 1, at 378-79.

from a variety of perspectives. Although his narrator cannot actually see into the minds of the people he writes about (as he could if he were writing fiction and describing the characters he invented), he creates that illusion by telling us what people later reported they were thinking or feeling as events unfolded. For example, the narrator tells us that Tony “thought Humes was an unfortunate bystander, which made her, regrettably for her, a convenient target.”⁷ And at another point, the narrator describes Doyle’s inner turmoil as he questioned expert Kurt Benirschke:

Doyle sweated each new answer. He didn’t know what Benirschke would say, only that he would “call it as he sees it.” Like Koskoff, he wanted to take him as far as he could, then stop, but he was groping in the dark. He didn’t know where the edge was. Measuring every word, he tiptoed on.⁸

Werth permits his narrator to editorialize and provide background information that no single participant would have known. Werth explains, “For background, I relied on a variety of published sources.”⁹ He then lists six pages of sources under the headings “Reproductive Medicine,” “Birth Injury and Neurological Impairment,” “Medical Malpractice,” and “History of Law and Medicine.”¹⁰

Werth’s decision to tell the story from multiple perspectives allows the narrator to detail the lawsuit’s impact on people from both sides of the case—the Sabias, Maryellen Humes, the plaintiffs’ lawyers, the hospital’s lawyers, the insurance companies’ lawyers, and others. In that way *Damages* contrasts with Jonathan Harr’s *A Civil Action*,¹¹ in which the third-person narrator limits the story to the perspectives of the plaintiffs and their attorneys.

B. Character

The second crucial element of narrative is character. Stories generally involve people (and occasionally animals, wizards, or other humanlike beings), either characters who are invented by a fiction writer or real people who are revealed by a nonfiction writer. Fiction writers face a number of choices. Which of the characters should be fully developed as complex human beings and which will make brief appearances merely to advance the plot? Will the characters develop and change or remain static? Will the writer describe the character’s physical appearance, speech, clothing, actions, thoughts, or feelings? How will the writer make the reader care about the characters?

Writers of nonfiction have to make similar decisions. In addition, they have to consider how their choices will affect the real people they describe, especially if the writer is privy to otherwise confidential information. Many memoir writers have alienated family members who felt betrayed when their family secrets were published. Werth, of course, is in an entirely different position. From the outset,

7. *Id.* at 211.

8. *Id.* at 304.

9. *Id.* at 379.

10. *Id.* at 379-85.

11. JONATHAN HARR, *A CIVIL ACTION* (1995).

all of the people who provided him with information knew that he intended to publish their story. That knowledge allowed the Sabias, Humes, and the attorneys to select what they chose to share with Werth, although most of the participants were remarkably forthcoming.

The participants Werth describes most fully are Tony, Donna, and Humes—the plaintiffs and defendant caught up in a lawsuit all would have preferred to avoid. Werth's portrayal of these three people presents both their strengths and their weaknesses. Tony is depicted as a devoted father who is determined to keep his son at home even if that decision forces him to hold down two jobs, neglect Donna and his other children, and ruin his own health. Werth's picture of Donna is that of a strong woman who routinely deals with a daily dose of care giving and heartbreak that would destroy most ordinary mortals. But he also describes her breaking point, which occurs in 1992, eight years after Little Tony's birth:

And then, on a night in April, after another fight, Donna quietly packed up and left. With the kids asleep, she loaded her clothes into the van. The money from the settlement still hadn't come.¹²

Humes, too, is presented as admirable but flawed, a woman who endures years of suffering, and bears the additional burden of knowing that she has few, if any, supporters:

For seven and a half years, Humes never wavered in her belief that she had done nothing wrong in regard to the Sabias. On the contrary, she believed that she, too, was a victim, like them. She saw herself and the Sabias as fatefully allied, cosufferers struggling to recover from the same awful event. They'd been dumped together by circumstance, hurt by the same people. The clinic at Norwalk Hospital, the boys' club, Fortuna, McManamy—all had failed, then abandoned them. Not many people sympathized with this interpretation: How they wondered, could Humes compare her suffering to the Sabias? Next to them, what had she lost?¹³

Werth selects a variety of techniques to fully reveal Tony, Donna, and Humes. He describes their physical appearance, their personal histories, their words, and their actions; he allows them to speak for themselves and to explain their emotional responses to various events; and he reports other people's opinions of them.

In addition, he reveals both Humes and Tony by focusing on the physical surroundings they create for themselves. Werth characterizes Humes' expensive and endless renovation of her house as a "metaphor for [her] life, an emblem of her self-determination and reach."¹⁴ And he shows us the similarities between Humes and Tony by describing Tony's equally obsessive efforts to improve his house: "Never skilled with tools, he taught himself to repair cracks and broken pipes. Working slavishly, he became a grim-faced do-it-yourselfer, pouring money and

12. WERTH, *supra* note 1, at 233.

13. *Id.* at 194.

14. *Id.* at 195.

sweat into one project after another until the house stood out as one of the best kept in the neighborhood.”¹⁵

The other actors in this drama receive less attention. Although attorneys like Michael Koskoff play major roles in the case, Werth’s descriptions of them are limited to the aspects of their lives that are relevant to the *Sabia* case. For example, we know a great deal about Michael Koskoff’s relationship to his father, the attorney whose influence shaped Koskoff’s career, but nothing about his relationship to his mother, his wife, or his children.

Although not fully revealed, even the people who have little more than walk-on roles in this drama are vividly presented. For example, when Werth recounts Koskoff’s and Bernard’s meeting with Dr. Leslie Iffy, he creates an unforgettable image of Dr. Iffy by describing his possessions:

Iffy was a collaborator of Apuzzio’s, a Hungarian immigrant and coauthor both of Apuzzio’s recent textbook and of the earlier text to which he had contributed a chapter. A lavish host who likes to provide steaks and drinks at depositions, he suggested that rather than talk in his office they drive out to his house, in nearby Summit. The three climbed into Iffy’s gold Mercedes and soon arrived at his rambling “stockbroker Tudor” on Summit’s posh north side. With massive stone chimneys and leaded, diamond-pane casement windows, the house had been built in the 1920s, when Wall Street’s newest barons strove to appear as if they’d come from Old Money. It was adjoined by a three-car garage that Bernard had learned also housed a Jaguar.

. . . His house was dark inside, with a large painting of a female nude in the study, and he kept dogs “the size of horses” that Bernard recalls filled the rooms with a powerful stench. “You could die in there,” Bernard would say.¹⁶

C. Setting

The third element of narrative is setting, which can involve a physical locale, a time period, a social or cultural milieu, or a political or historical movement. Setting can be integral to a story or inconsequential. If a writer wants to describe a woman’s grief when she learns that her husband has been killed in battle, it matters not whether his death occurred during the Civil War, World War II, or the Gulf War. However, if the writer wants to explore the mixture of grief and anger that follows the death of a soldier killed in an unpopular war, the Vietnam War is an obvious choice.

Werth uses memorable details to describe physical settings, often enabling us to peer beneath surfaces. For example, his description of Tony’s parents’ house in Norwalk shows us more than we could have observed by walking though the neighborhood:

15. *Id.* at 107.

16. *Id.* at 180-81.

The house was a vinyl-sided three-bedroom raised ranch in a luckless subdivision called Bound Brook Estates, locally known as Sunken Homes. One hundred and five lots on a reclaimed swamp, the neighborhood was in slow-motion collapse. In dozens of the lowest-lying houses, windows, walls, floors, and joists buckled and cracked. Pipes sheared and posts poked helter-skelter through wavy rooflines as houses sagged into the water table. The whole place, at the heart of Fairfield County, one of the wealthiest counties in America, was settling into the weak earth.¹⁷

With a photographer's eye for detail, Werth captures the spirit of the buildings he describes. He shows us the Koskoffs' offices, which are located in a "suite [that] had been the hotel's grand ballroom. Now it held two tiers of cubicles stacked around a painfully bright, two-story, seventies-style reception area—white quarry-tile floor, royal blue carpet, modern spiral staircase, a burbling fountain lit up from within by colored floodlights."¹⁸ He lets us visit Humes' home, a "stone house and studio on Old Hill [sitting] on a sloping acre at the bottom of a winding lane . . . Now the property was overgrown, a maze of low-slung boxes, mortared walls fourteen inches thick, a gnome's hut deep in a shadowy forest."¹⁹ He points out Norwalk Hospital, with its "brick towers squatting fortresslike on a hill overlooking downtown Norwalk."²⁰

In addition, Werth devotes a number of pages to the social-political-cultural climate of the United States at the end of the twentieth century, particularly the developments in medicine, law, insurance, and politics that contributed to this particular story. He presents a lengthy history of the field of obstetrics, which includes a description of early obstetrical practices that actually spread childbirth fever.²¹ He chronicles the events that elevated negligence lawyers from the status of "bottom-feeders" before World War II²² to positions of power and prestige. He explains the process that enabled the American Trial Lawyers Association (ATLA) to become an "unbeatable lobby" during the 1970s.²³ He describes the skyrocketing costs of Humes' medical malpractice premiums ("an eightfold increase in five years").²⁴ He provides context for that information by including a *Nightline* report that an "investigation by the Minnesota Department of Commerce found that outsized profit margins, not increased costs, were driving up liability premiums, and that St. Paul especially had been guilty of price gouging."²⁵ And he explains how medical, legal, and insurance interests, along with the Democrat and Republican parties, lined up to battle over health care reform in 1991.²⁶

17. *Id.* at 10.

18. *Id.* at 43.

19. *Id.* at 28.

20. *Id.* at 12.

21. *Id.* at 69-72.

22. *Id.* at 54.

23. *Id.* at 62.

24. *Id.* at 108.

25. *Id.* at 109.

26. *Id.* at 191.

D. Plot

The fourth element of narrative—plot or story line—presents additional choices. Where should the story begin? How should the story be structured to maintain the readers' interest? Which incidents and people should be included and which omitted? Which events should be summarized and which dramatized in real time? By this point you may be thinking, "Wait a minute. Those questions may be appropriate for analyzing fiction because a fiction writer invents the plot, but Werth can't do that. He has to report what really happened." Although that observation correctly recognizes that the fiction writer has a wider range of options, it is premised on the incorrect assumption that this particular storyline existed before Werth created it. The events had already occurred, but the story of those events was invented by Werth.

Let's return to the thought experiment posed at the beginning. Let's assume that you decided to write a personal narrative about your law school years. Where would your story begin? With your first day of class? With the law school professor who inspired you to choose a specific area of practice? With your first glimpse of the classmate who later became your spouse? With your reading of *To Kill A Mockingbird*²⁷ in the eighth grade, an experience that inspired you to become a lawyer? Each opening would give your story a different focus.

And which events would you choose to include in your narrative? The incidents you choose to omit may be as significant as those you choose to include because life does not unfold in a neat plot line where every event is causally related to another. Instead life is a chaotic series of unrelated incidents. If you recall any particularly momentous day in your life—leaving home for college, attending a Phish concert, surviving your first day of work, winning a moot court competition—you are likely to focus on the incidents relevant to that particular story. But even on those special occasions, actions totally unrelated to the central event intrude. In real life, just as the bride is leaving the house for the wedding ceremony, she may receive a telephone call—from a pollster conducting a survey, from a long-lost friend inviting her to lunch, or from an employer offering her a job. Life is just one incident after another; stories are our attempt to give form and meaning to those incidents.

But back to *Damages*. How does Werth choose to structure this narrative? He elects to tell the story in more or less chronological order, beginning on February 25, 1983, with Donna and Tony meeting for the first time "at a stop just past the Woodrow Wilson Memorial Bridge on I-95, near Washington, D.C."²⁸ and ending on October 23, 1996, with Donna and Tony talking to Little Tony in the post-operative area of Connecticut Children's Medical Center in Hartford.²⁹ Werth highlights the chronological structure of the book by using dates as the headings for some sections.

But even though the general movement is forward, the pattern is two-steps forward and one-step back as Werth fills in background information. We first meet Dr. Maryellen Humes when she is called to the hospital to assist with

27. HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

28. WERTH, *supra* note 1, at 1.

29. *Id.* at 375.

Donna's delivery. Later, in chapter two, we step back to read a summary of Humes' childhood, her education at Stanford, her marriage, her medical training, her three daughters, her divorce, and her decision to specialize in obstetrics and gynecology.³⁰ Werth continues this pattern as he introduces other people such as Mary Gay,³¹ Michael Koskoff,³² Pat Ryan,³³ and Tony Fitzgerald.³⁴ Werth also stops the clock to discuss past cases, such as Sponge Rubber,³⁵ that have nothing to do with the Sabias or medical malpractice, but everything to do with the adversarial relationship between Michael Koskoff and Bill Doyle.

To recognize that Werth's begin-at-the-beginning approach is one choice among many, we have only to contrast *Damages* with *A Civil Action*.³⁶ *A Civil Action* opens in Boston in 1986.³⁷ In the first scene plaintiffs' attorney Jan Schlichtmann hands the keys of his Porsche to the sheriff who has come to repossess it. In the second scene, two days later, Schlichtmann walks to the courthouse to wait while the jurors begin their second week of deliberations in the case that led to Schlichtmann's financial crisis. The next chapter takes us back 20 years to Woburn, Massachusetts, where a suspiciously large number of children have been diagnosed with leukemia.³⁸ The story then proceeds forward with the Woburn parents persuading Schlichtmann to take their lawsuit against the corporations whose hazardous wastes may have polluted the water and caused the increase in leukemia.³⁹

The writer also has to decide how he will keep the reader interested in the plot, and there are a number of formulas for creating suspense. The writer can end a chapter with a cliffhanger: "Lois was trapped on a ledge that would soon be covered by the rising tide." When we turn the page to learn what happens to Lois, we discover that the scene has changed, and we will have to wait for the answer: "Dave's first response was irritation. Why hadn't Lois called to say she would be late?" The writer can also pique our curiosity with foreshadowing: "If Josh had known what the passenger is seat 4B carried in her briefcase, he would never have boarded the plane."

Werth combines both techniques in this scene from the Fourth of July picnic hosted by Tony and Donna:

Saying he wanted to go for a ride to cool down, Tony started looking for his car keys. Donna thought he shouldn't drive and, sneaking around a hedge, entered the house ahead of him. She snatched his keys and her own and hid both sets. When Tony asked where they were, she wouldn't tell him. Tony blurted something. He was feeling bottled-up, hateful. His eyes were narrowed. Watching him grab a pack of cigarettes and skulk out the front door, Donna could see the frustration poisoning his

30. *Id.* at 26-29.

31. *Id.* at 37-40.

32. *Id.* at 57-63.

33. *Id.* at 84-85.

34. *Id.* at 343.

35. *Id.* at 257-59.

36. HARR, *supra* note 12.

37. *See id.* at 1-8.

38. *See id.* at 9-50.

39. *Id.* at 51-82.

face. She hoped she'd done the right thing.

Tony went out to his truck, got in and turned on the radio, which he had wired through the dashboard so it could be used without a key. Sitting quietly, he watched Shannon and a friend walking up the driveway. A couple of his friends got in their car, waved, and pulled away.

Reaching under the seat, Tony pulled out the gun. He cradled it in his palm, feeling its heft.

....

Donna lurched at the sound of the gunshot, her heart racing. She feared Tony had killed himself.⁴⁰

The reader shares Donna's fear and keeps reading.

A less obvious technique for creating suspense is to raise questions the reader will want answered. A story, in contrast to a random string of incidents, captures our attention because we want to know whether the participants will succeed in overcoming the obstacles that stand in their path. We read to discover whether Oedipus can escape the fate Tiresias has prophesied—that he will kill his father and marry his mother;⁴¹ whether Hamlet will avenge his father's death;⁴² and whether Frodo Baggins will succeed in his quest to destroy the ring.⁴³

The central plot questions of *Damages* involve Tony and Donna: Will they succeed in their struggle to provide for Little Tony's overwhelming needs, hold their marriage together, find time for their other children, pay their bills, and learn the truth about what caused Little Tony's profound disabilities? The interrelated story line of Maryellen Humes raises other questions: Will she find affordable medical malpractice insurance? Will she be exonerated by the peer review board? Will she agree to a settlement of the *Sabia* case? Will she finish her remodeling? A third story line involves the *Sabia* lawsuit itself. Will Koskoff develop a unified theory? Will he find an expert whose testimony will support the Sabias' case? Should the Sabias accept a settlement rather than take their case to trial?

III. EVALUATING *DAMAGES*

Readers usually agree about which techniques a writer uses. No one who reads *Damages* is likely to argue that the book is a first-person narrative. The disagreements, as well as the fun, begin when readers move on to the third and fourth questions: How successfully does Werth use technique to achieve his purpose? Is his purpose worthwhile?

Damages has received a great deal of critical acclaim. It was a selection of

40. WERTH, *supra* note 1, at 153.

41. SOPHOCLES, OEDIPUS.

42. WILLIAM SHAKESPEARE, HAMLET.

43. J.R.R. TOLKIEN, THE LORD OF THE RINGS (1951).

the Book of the Month Club⁴⁴ and the Quality Paperback Book Club,⁴⁵ and a wide range of reviewers have recommended the book. Perri Klass, a practicing pediatrician and assistant professor of pediatrics at Boston University School of Medicine, writes that *Damages* “deserves to be read and thought about and discussed by people on all sides of the complex and often ugly collisions of law and medicine, but especially by people who will identify with the Sabias’ need for compensation and recognition.”⁴⁶ Kevin M. Quinley, a senior executive for a casualty insurance carrier, praises Werth for his story of the Sabias: “Their daily efforts to care for Tony reveal one of the dramatic stories that often lie behind the claim reserve numbers, the incurred-but-not-reported and other sanitized indices that represent claim severity.”⁴⁷ Lawyer-journalist William C. Smith calls the book “a taut, balanced account on one of the most politicized, emotionally charged areas of litigation: medical malpractice.”⁴⁸

Other reviewers like the book but note some flaws. Reviewer Kate Shatzkin criticizes Werth for his frequent use of partial quotations to help the Sabias tell their own stories.⁴⁹ For example, Werth explains that Donna’s “real father ‘wasn’t around much,’ so her mother had divorced him, putting Donna and her sisters up for adoption when Donna was three.”⁵⁰ Although Shatzkin commends Werth for his careful attribution, she complains that she found the technique distracting, and she concludes, “In the end, I felt I knew the case that bore the Sabias’ name, but not the people at the center of it.”⁵¹

Investigative reporter Steve Weinberg places *Damages* “in the same league as Jonathan Harr’s masterpiece, *A Civil Action*,” but concludes that *Damages* must be removed from masterpiece contention because Werth makes the mistake of “including too much medical detail about complicated deliveries of twins.”⁵²

Another reviewer, Mike France, criticizes Werth for what he fails to do:

What the reader really yearns for—after investing the time to learn the mechanics of medical malpractice suits—is a bit of thoughtful analysis. Is the system fair? Can it be improved? Werth basically ignores these questions, choosing instead to press forward his narrative about what is, legally speaking, a not particularly interesting or thought-provoking case.⁵³

Unlike Shatzkin and Weinberg, France does not criticize a specific technique,

44. Barry Werth (March 2003) (unpublished biography for “When Law, Medicine, and Insurance Collide” Symposium) (on file with the Center for the Study of Dispute Resolution).

45. *Id.*

46. Perri Klass, *A Calculable Loss?*, N.Y. TIMES, Feb. 22, 1998, § 7, at 24.

47. Kevin M. Quinley, *Tragedy Should Spur Look at Litigation Process*, BUS. INS., June 22, 1998, at 22.

48. William C. Smith, *Med-Maelstrom: Tale of One Couple’s Malpractice Lawsuit Depicts the Destructive Nature of Modern Litigation Practices*, A.B.A. J., Mar. 1998, at 92, 92.

49. Kate Shatzkin, *Barry Werth’s “Damages”: Truth Is the Victim*, BALTIMORE SUN, Mar. 1, 1998, at 5F.

50. WERTH, *supra* note 1, at 10.

51. Shatzkin, *supra* note 49, at 5F.

52. Steve Weinberg, *Legal Thriller’s Strength Is as Chronicle of Fact*, ST. LOUIS POST-DISPATCH, Feb. 8, 1998, at D5.

53. Mike France, *See You in Court*, BUS. WK., Apr. 13, 1998, at 14 E1.

and he does not suggest that the book fails to achieve Werth's purpose. Instead, he faults Werth for choosing the wrong purpose.

How would you respond to the concerns raised by these reviewers? Do you find the partial quotes distracting? Do you feel that you know the Sabias as people? Do you think the book includes too much medical detail? Do you think Werth should have focused on analysis rather than narration? Those are questions no one else can answer for you, questions you should continue to ask yourself as you read and reread *Damages*.

IV. QUESTIONS FOR DISCUSSION

1. Werth tells us that "Tony wanted more than anything else the *vindication* of a trial. He had done all he could to keep his family from coming apart. What he craved now was recognition, not for his efforts but for his injury. Tony wanted the world to acknowledge his family's suffering and concede that they had been wronged."⁵⁴ Werth also reports that Tony "wanted Doyle to acknowledge that the hospital was at fault for killing Michael and devastating Little Tony and making him and Donna wrecks."⁵⁵ Later, when Tony and Donna agree to settle the case for \$6.25 million, Tony gives up his dream of vindication in the courtroom, and of course he never receives either an admission of guilt or an apology from the defendants. Does that mean the legal system failed Tony? Does the book *Damages* provide adequate public recognition of the Sabias' suffering?

2. Although the tragic story of Tony's mother Dorothy Sabia is not directly related to the events of the *Sabia* case, Werth includes it in the book, revealing it little by little. He first alludes to it when Tony asks his aunt for permission to bury Michael on top of his grandfather. She is offended and says, "Why don't you bury him with your sisters and brother." At that time Tony "knew nothing about any dead siblings."⁵⁶ When he later wanders through the cemetery and sees a headstone with the names of three Sabia children who died five years before he was born, he suddenly recalls a teenager who had taunted him with remarks about his family and a fire, and he assumes that his parents lost three children in a fire.⁵⁷

We return to the Dorothy Sabia story 200 pages later, just after Donna leaves Tony. In a flashback to 1951, Werth describes the scene leading up to Dorothy's attempt to kill herself and her children.⁵⁸ A few pages later, we learn that Dorothy spent three years in prison for killing her children and that her husband took her back after her release.⁵⁹

Werth connects the two stories by stating that even though Tony would not learn about his parents' past for another two years, Tony's decision to take Donna back mirrored his father's decision to give his mother a second chance.

Is the parallel strong enough to justify including the otherwise unrelated story? Does the story about Tony's parents add significantly to your understanding of Tony? Or is it included merely for its plot value, its power to keep the

54. WERTH, *supra* note 1, at 298.

55. *Id.* at 359.

56. *Id.* at 23.

57. *Id.* at 24.

58. *Id.* at 234-36.

59. *Id.* at 238.

reader turning pages?

3. In *Damages* we learn very little about Shannon, even though Little Tony's medical problems, his twin's death, and the resulting strains on her family must have had a dramatic effect on her. She is revealed almost entirely through her parents' comments about her. Why doesn't Werth give Shannon an opportunity to tell her version of events, as Tony, Donna, and Humes do? Is Shannon's background position in the book meant to reflect her background position in a family that must focus its attention on Little Tony? Do you think Werth decided to protect Shannon's privacy by saying as little as possible about her?

4. When Pat Ryan invites Michael Koskoff to talk informally with Norwalk Hospital's executives about *Sabia*, Koskoff decides to prepare a "live settlement brochure" for a hostile audience.⁶⁰ Werth includes every word of that presentation (as later re-created by Koskoff speaking from his original notes), which gives us the opportunity to evaluate it, even though we have to judge it as a written document rather than an oral presentation. Read Koskoff's presentation again,⁶¹ and answer these questions:

- a. What is the purpose of his presentation?
- b. What techniques does Koskoff use to achieve that purpose?
- c. How skillfully does Koskoff use those techniques?
- d. Should he have selected a different purpose for his presentation?

Werth tells us that Koskoff is one of the country's most successful trial lawyers, and that he prepared diligently for the presentation, which he envisioned as "a kind of live settlement brochure presented to a hostile group of executives on their own turf."⁶² And yet, from Koskoff's perspective, the presentation failed. David Osborn, the hospital's president and CEO, asked only one question: "Where did you get \$22 million?"⁶³ After Koskoff responded, Osborn thanked Koskoff and Bernard for coming. Werth tells us that Koskoff was "baffled by this brusque dismissal. . . . He didn't expect them to accept his terms, but he expected something, some discussion. . . . Outside in the hallway, he turned to Bernard and muttered, 'What was *that*?'"

What went wrong? Why didn't Koskoff's presentation succeed?

5. In *Damages* Werth tells us that in 1993, Koskoff was encouraged to learn that a Kansas jury had returned a \$21 million verdict for plaintiffs in *Aves ex rel. Aves v. Shah*, a case with facts nearly identical to those of the *Sabia* case.⁶⁴ In the appeal of the *Aves* case, the Tenth Circuit summarized the facts in just over 400 words:

This medical malpractice action involves the birth of twins to Plaintiffs-appellees Dan and Faye Aves. Plaintiff-appellee Darcy Aves was the second twin born to Ms. Aves on December 26, 1984, at Central Kansas Medical Center of Larned, Kansas. Dr. Nasreen G. Shah treated Ms.

60. *Id.* at 244.

61. *Id.* at 245-51.

62. *Id.* at 244.

63. *Id.* at 451.

64. *Id.* at 295.

Aves throughout her pregnancy and delivered the twins.

Ms. Aves had been hospitalized from December 6 through 8, 1984, with a diagnosis of "preeclampsia," a disease of pregnancy which is often accompanied by high blood pressure, edema and the presence of protein in the urine. Preeclampsia may signal danger to the health of both mother and child with the only remedy being delivery.

After Ms. Aves was released from the hospital, Dr. Shah ordered bed rest and a low salt diet with office visits of increased frequency. At the December 18, 1984 visit, protein in the urine was noted and on December 21, 1984, an elevated blood pressure was recorded. Given these warning signs and the other factors creating a high-risk pregnancy, such as multiple fetuses, first pregnancy and breech presentation of the first twin, the Plaintiffs contended that Dr. Shah should have transferred Ms. Aves to a better equipped facility to deliver the twins immediately, possibly via a cesarean section.

Ms. Aves was admitted to the hospital in Larned on December 26, 1984 after experiencing membrane leakage. Dr. Shah administered Pitocin, a drug used to induce labor. Although an electronic fetal heart monitor was available at the hospital, the printer was malfunctioning so that a monitor strip was not produced. According to several of the experts, a fully functioning monitor would likely have alerted Dr. Shah to fetal distress.

The breech twin was delivered before Darcy. Upon Darcy's delivery, respiratory distress was immediately apparent and she was transferred to another facility. The documentation that Dr. Shah completed to effect the transfer noted that complications of the pregnancy included "toxemia," another term for preeclampsia. Also noted, although Dr. Shah testified mistakenly so noted, were variable decelerations, potentially ominous changes in the baby's heart rate prior to delivery. Finally, although her testimony on this point was somewhat confused, Dr. Shah checked "severe asphyxia" as another condition existing at birth.

Darcy suffers from epilepsy, cerebral palsy, mental retardation, cortical blindness and small head size. Medical and economic experts testified for the Plaintiffs concerning the staggering cost of caring for Darcy for the remainder of her life. Such costs will include therapy, prescription drugs, medical testing, education and group home placement.

The jury assessed ninety percent fault attributable to Dr. Shah, with the remaining ten percent to the Central Kansas Medical Center. Dr. Shah's share of the damages assessed by the jury amounted to \$21,244,824.90 and judgment was entered accordingly. Dr. Shah appeals and, with juris-

diction arising under 28 U.S.C. § 1291, *we affirm*.⁶⁵

The traditional approach to legal instruction in America—the casebook method—requires students to read hundreds of appellate decisions, most of which include equally terse accounts of human suffering. How might this pedagogical approach affect future lawyers? Can reading a book like *Damages* help law students develop the ability to empathize with their clients?

65. *Aves ex rel. Aves v. Shah*, 997 F.2d 762, 763-64 (10th Cir. 1993).

