

**Nigel Bruce**, English Centre, Hong Kong University, Pokfulam Road, Hong Kong.

[njbruce@hku.hk](mailto:njbruce@hku.hk)

**Tel (H): (852) 2817.3489; Tel (Wk): (852) 2859.2023**

**Fax: (852) 2547.3409**

Nigel Bruce has taught English in France, Mongolia, and Kuwait, and has spent the last 13 years at Hong Kong University teaching academic communication skills. He currently teaches students of Law, Dentistry, Social Sciences, Arts and Applied Linguistics. His research and development interests are in constructions of knowledge and practice, academic writing, and the potential of the Internet for promoting autonomous learning and enriching writing response practices across the academy. Recent publications include *Integrating computers into teaching practices: the value of a broad-based approach*, in Eds J. Gassin et al: *Proceedings of the 1998 WorldCALL Conference* (1999), and *A certain "je sais quoi" - the voice of authority in Emile Peynaud's "The Taste of Wine"* (1999), in the Web (<http://ec.hku.hk/kd96proc/>) and CD-ROM published *Proceedings of the 1<sup>st</sup> International Knowledge and Discourse conference*, co-edited with Colin Barron.

## **"Dovetailing language and content:**

### **Teaching balanced argument in legal problem answer writing"**

#### **Abstract**

This paper describes an approach to teaching 1<sup>st</sup>-year law students how to write the academic genre of the legal problem answer. The approach attempts to offer students the rhetorical tools to translate legal reasoning moves into an effective written response to legal problems. The English for Academic Purposes (EAP) course in question shadows one specific law course, Tort, and is the outcome of close and continuing collaboration with the teachers of that course. The dovetailing of language and content involved considerable research into the law of tort, and into the legal reasoning moves required to analyse the legal problem question genre, as well as to compose an effective and economical answer to such questions. The paper highlights the importance of balanced argument in legal discourse, and shows how the rhetorical elements of concession, contingency and end-focus can serve to help students distil persuasive, pertinent and economical problem answers. The paper offers examples of how this can be achieved in an EAP course, and concludes by exploring the applicability of these ideas and strategies to other areas of EAP.

## **Introduction**

In this paper I describe an approach by an English for Academic Purposes (EAP) Teaching Unit<sup>1</sup> to providing academic communication skills training for 1<sup>st</sup>-year Law students at Hong Kong University. The Law department needed a program to help their students read and write legal English more effectively. I describe the development, structure and pedagogical rationale of an English for Law course that took as its subject matter the authentic professional legal genres of case reports and ordinances, and culminated in an academic legal writing phase. This final phase of the course drew on all the legal reasoning and argumentative moves covered in those authentic legal texts, and taught the students how to apply them to the standard academic legal assignment: the Problem [Question] Answer. This genre, the focus of this paper, is widely used in testing law students' understanding of the applications of legal rules in core legal branches like Contract, Criminal Law, Trusts and Equity, Commercial Law and Tort, and is the favored format for at least 50% of students' 1<sup>st</sup>-year exam questions. The general skills this genre trains, of applying law to the facts of a case, are also key professional skills that lawyers will apply throughout their careers (Nathanson, 1997).

### **1. Dovetailing Language and Content**

Approaches to teaching language through content have most traditionally – and least imaginatively – been theme-based, using content topics or texts as vehicles for the conventional teaching of specialized vocabulary or high frequency language forms. Increasingly, however, more integrative approaches have emerged at the tertiary level. Protected or “sheltered” courses have been attempted, especially in immersion or ESL settings (e.g. Hauptman et al in Ottawa, 1988), but the model which is probably most common in Writing Across the Curriculum (WAC) schemes is the “adjunct” course. Snow and Brinton (1988) offer a useful rationale for the adjunct model as it was implemented at UCLA, where a language and a content course shared the same “content base”. Adjunct

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<sup>1</sup> The English Centre at Hong Kong University. Two of the original team of teachers still teach on the course: Robin Corcos, the original coordinator and principal developer of the course, and Agnes Lam. The author joined the team in 1995, and coordinated the course between January 1999 and June 2000.

models can take many forms, but the nature of the language-content collaboration tends rarely to be as rich or “full-blown” (Snow and Brinton, 1988) as those described by Walvoord and McCarthy (1990) and McCarthy and Fishman (1991). In their exploratory and reflective action research collaborations, they show how attempts to dovetail language and content benefit from moving beyond the incorporation of disciplinary content as a language teaching vehicle. They emphasise the importance of the nature of the collaboration between the subject and language teachers, but also the ability of the language (EAP) teacher to assume sufficient disciplinary competence to challenge their students intellectually on matters of disciplinary interpretation and articulation. That said, teachers of legal communication skills who lack legal training need to be clear about the limits of their subject knowledge, and be prepared to say: “you’d better ask your law tutor that”.

EAP curriculum designers choosing to integrate language and content need to strike the right balance between their consideration of the students’ comfort with and desire for *content* in their EAP course, and their own need to ensure they actually improve students’ ability to apply the appropriate rhetorical-legal reasoning and argumentative skills to their disciplinary assignments. Before describing how we set about doing that, I need to put the course in its educational context.

## **2. The English for Law course at Hong Kong University**

### **a) Background**

Hong Kong University is one of seven ESL-medium universities in Hong Kong, in which the entire curriculum, Chinese Studies apart, is taught to Chinese-L1 students in the medium of English. Two universities in Hong Kong teach Law – Hong Kong University, and City University of Hong Kong. They teach an undergraduate program, the Bachelor of Laws (LLB), and a postgraduate certificate in Laws (PCLL). The English for Law course is taught to 1<sup>st</sup>-year law students, and its focus is on academic legal reading and writing skills. The more professional writing skills are left to the PCLL program. The English course was developed in 1993 in response to Law Faculty dissatisfaction with the language-skill training they were offering themselves. The EAP and Law teachers agreed that the best way forward would be to attempt to deliver a course which dovetailed very closely with one of the 1<sup>st</sup>-year

Law course – the law of tort. There were two main reasons for this choice. Experience with other disciplines – Engineering, Architecture, Medicine, Social Sciences – had told us that language problems in our ESL-medium tertiary curriculum were best addressed using the language in the target study context, with materials that were discipline-based and patently relevant to the students’ core curricular needs. Our experience had also told us that the higher the relative English competence of the incoming students, the less willing they are to devote a chunk of their schedule studying communication skills in isolation from their curriculum. The incoming Law students traditionally have among the highest school-leaving English grades in the University, so it was clear that for the course to be accepted by the students we would need to go the extra mile to learn about one of their disciplinary subjects – Tort, which is the branch of common law concerned with providing a civil remedy to persons harmed by the careless or intentional conduct of others. Our course narrowed its focus to Negligence, the core of the 1<sup>st</sup>-year tort curriculum<sup>2</sup>.

#### **b) Curriculum Design**

The English for Law course is a First-year course (in a 3-year curriculum) which runs for the whole academic year, with 2 meeting hours over 24 teaching weeks, and comprises continuous assessment and a final exam. The authentic materials used are two major and challenging types of legal document, central to any Law student or practitioner’s life: the case report and the statute. Put very briefly, case reports are lengthy verbatim reports of the judgments of court cases - notably those of the higher courts of appeal, while statutes, known as Acts of Parliament in the U.K and ordinances in Hong Kong, are the body of legislation that attempts to regulate social and economic practice. These genres are used not only to develop students’ legal reading skills, but also to teach the key reasoning and argumentation moves that we later channel into our teaching of exam writing skills. The legal genre that allows us to teach these skills is the Legal Problem Question Answer, a text type that involves producing the kind of legal rhetoric needed to apply legal reasoning to the facts of a case, an essential skill for a lawyer. The other academic legal genre the students are confronted with in exams is the legal essay, which has in the past been taught in the Legal Skills course by members of the Law Department. While the Problem Question (see p.6 below for an example) is, like the “essay title”, a purely academic or educational genre

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<sup>2</sup> For a detailed account of how the course was negotiated between the English and Law teachers, see Allison,

(Howe, 1990: 218), it was devised as a means of training students to think – and argue - like a lawyer:

“Almost every law school exam question presents the students with an original (and often bizarre) fact pattern and demands that they predict the likely legal response. The theory of this kind of testing is that this is just what lawyers do when clients appear in their offices and tell them about their problems”

(Conley and O’Barr, 1998: 133).

It was logical to culminate the course with a writing phase centered on the Problem Question, given its relevance to the students’ final exams. The cumulative design of the course was also deliberate, as the analytical skills, reasoning patterns and rhetorical structures needed to answer the PQ were all covered in teaching the case report and ordinance reading skills earlier in the course.

### **Legal vs Linguistic knowledge**

The question of balance between knowledge of, and focus upon, language and content is one of the perennial issues of debate in EAP. In the domain of EAP for law, Vijay Bhatia suggests that the primary task of the ESP teacher is to ensure students’ ability

“to appreciate which facts of the case are legally material, distinguish(ing) them from those that are legally immaterial, (to decide) whether an earlier decision or rule of law is relevant, whether a particular case is distinguishable from another, and to deduce the ratio decidendi<sup>3</sup> of the case” (1993: 176)

This advice invites the criticism, identified by Spack (1988) and elaborated by Howe in an English for Law context (1993), that EAP teachers will be seen as overreaching themselves and pretending to an expertise that they can only feign or simulate. In the context of our course, and the relationship we have with the Law department, the EAP teacher needs to be careful to distinguish between a role in identifying legal reasoning and rhetorical moves and structures (rhetorical knowledge), and a role in arbitrating on points of law (substantive knowledge). While lawyers see these processes as inextricable from each other, it is the

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Corcos and Lam (1994): “Laying down the law? Reflecting on course design in progress”

<sup>3</sup> In the US this would be called the “holding”, the process of reasoning by which a legal rule or principle is applied to the specific facts of a case.



period of the Problem Answer Writing Module<sup>5</sup>, and the Tort teachers have been very satisfied with the impact on the students’ writing on their own exams. There is a general acceptance that the skills learned on our course are transferrable to the other law courses, many of which also feature problem exam questions.

In the next two sections I describe that part of the course which addresses the legal writing skills students need to tackle the exam assignment of Problem Question Answers (PQAs). I pay particular attention to strategies I have developed to give students a better understanding of how to argue and organize their arguments. I introduce a framework for bridging language and content, and then discuss some strategies I have developed for teaching some key rhetorical functions in writing PQ answers.

### 3. Re-emphasising language: A rhetorical-legal reasoning framework

I have argued that it is important for an EAP course to take a functional approach to analyzing a communicative genre. The approach I have developed is to attempt to make clear to my law students how legal reasoning and argument serve to bridge language and content in their curriculum. The following diagram illustrates this relationship as a spectrum, from the legal to the linguistic:

*SPECTRUM:*                      **LEGAL**                      ←————→                      **LINGUISTIC**

<b>Legal Genre:</b>	<b>Legal Content/Study Skills</b>	<b>Legal Reasoning “moves”</b>	<b>Legal Rhetorical Functions</b>	<b>Rhetorical Structures</b>
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This spectrum provides a framework for the analysis and teaching of the discourse patterns in any genre. I suggest to the students that the most effective way for them to improve their academic legal writing is to follow a functional approach to their analysis of case reports: identifying the facts, that give rise to issues, the application of legal principles to those facts, and the judges’ conclusions on each issue. This functional sequence can then be applied to

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<sup>5</sup> The two timed writing exercises and the final test were carefully matched for content, to allow us to measure improvement in students’ PQA performance. In 1998/99 the 143 students averaged an improvement from C- to



There is no space here to discuss the interdiscursive dimension to our serial but cumulative treatment of these three genres. The judgments in the case report feature the core reasoning and rhetorical moves that it is intended the student should apply in their problem question answers, while statutes offer the opportunity for the intensive analysis of rhetorical structures expressing circumstance, condition and contingency – linguistically complex but essential to any realistic legal pronouncement. The Problem Question Answer, unlike the case report and statute, is an academic and not a professional genre, but this is fitting as this is the genre that the students, as 1<sup>st</sup>-year law students engaged in their first undergraduate degree, are asked to write to show their legal reasoning skills and ability to apply tort law to practical legal problems. The PQA is therefore very much an “EAP” genre, and not one professional lawyers will be required to write<sup>6</sup>.

In the next section I introduce some transferable strategies and heuristic devices (diagrams and tables) that I have found help students to organize and articulate their reasoned analysis of a Problem Question Answer.

#### **4. Legal writing: A case study in Tort**

In this section I follow through a PQA case study in an attempt to show how the emphasis on legal knowledge is maintained in a delicate balance with the need to apply that knowledge in the most efficient and elegant way possible. Not only are law teachers generally intolerant of irrelevant information and verbosity, but the students cannot afford to waste any time over such irrelevancies. Ultimately, they need to be able to complete a PQA in 40 minutes, the time allotted for such answers in their end-of-year exams.

The writing module lasts for 7 weeks, and begins and ends with an in-class Timed writing exercise, designed to replicate the authentic exam context. Students are given 5 minutes to read and consider the question, and then 40 minutes to write their answer. The scripts they produce are critiqued in the next session. In the middle part of this module, a 3<sup>rd</sup> problem is worked on in much greater detail – the one we shall examine below. This PQ is the vehicle

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<sup>6</sup> As noted earlier, this first-year course does not aspire to teach professional writing skills to our students. After completing the undergraduate bachelor of laws degree (LLB), the students then proceed to do a

for most of our intensive, sustained focus on the functions and reasoning skills and techniques designed to help students handle PQAs with comfort.

**The Problem Question:** the problem below is closely based on a sample problem in a UK Tort textbook, explicitly aimed at training students in the writing of such answers. It is typical of one type of legal educational PQ, though in real life it is unusual for there to be so many parties involved. PQ exercises are designed to allow students intensive opportunities to show their legal reasoning abilities, and to show they can apply their theoretical legal learning to practical legal problems. In this problem, adapted from Green (1995), a Tort Law Question and Answer practice book, the material facts that students need to spot are underlined:

*“(1) Alan was burnt to death in a car accident caused by Brian’s negligence. (2) Charles and Daphne witnessed the accident, and Daphne unsuccessfully tried to rescue Alan. (3) Alan’s wife, Elaine, was told of the accident and saw Alan’s burnt and mutilated body at the hospital. (4) Alan’s mother, Freda, saw the accident live on television during an outside broadcast concerning redundancies at a nearby factory. (5) George, Alan’s father, was told of the accident but could not face seeing Alan’s body.*

*Advise Charles, **Daphne, Elaine, Freda and George**, all of whom have suffered nervous shock.”<sup>7</sup>*

Each teacher on the course has different strategies for teaching this material. I offer approaches that have worked for me, and which I think can be usefully applied to other EAP teaching contexts. . We feature this particular problem for intensive work on students’ writing skills precisely because it is a single issue – multi-party problem (most exam problems are multi-issue). This allows students a concentrated opportunity to practise the reasoning routines we discuss below, using conditional and concessive structures. Readers without a background in legal writing might benefit from looking at a sample answer to this problem (Appendix 3) before reading any further.

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postgraduate certificate in laws (PCLL), in the course of which they are taught professional skills.

<sup>7</sup> This problem is not a typical one, not only because it is a single-issue problem – deciding whether or not Brian owes a duty of care in nervous shock to the 5 parties - but because the students are already told that the defendant is negligent and caused the accident.

### **A. Content and reasoning:**

The module begins with an emphasis on *legal content and reasoning*. The students are told they will be looking at this problem first as an analytical or forensic reading exercise, looking for clues as to what the material facts and legal issues are. Advice abounds on the techniques and strategies students should use for interpreting PQs (e.g. Gaskell, 1995): “each word in the question has been put in for a reason; construct an answer plan; the structure is the most important aspect of a successful answer”, etc. The basic sequence recommended in Glanville Williams is the *IPCAC* legal reasoning sequence introduced in the above framework. Based on the material facts set out in the problem, a student should:

- identify the relevant **issues**
- identify relevant **principles** and **cases**
- **apply** the pertinent principles and precedent cases to the problem facts, and then
- draw their (perhaps tentative) **conclusions**

A important point to add here is that the law of precedent depends on the search for analogy between the facts of the case being tried and a past case whose ruling has come to represent the current state of legal interpretation in a specific domain. It is these cases which are “applied” to the problem facts in question; the closer the analogy, the less arguable the application and the easier for the judge – or student – to reach a conclusion. In the PQ example we will look at below, the area of law is nervous shock, and what is at issue are the conditions under which people directly or indirectly affected by a serious accident may recover compensation for nervous shock. Only after this analysis will they address the PQ as a writing task, with its requirement to give rhetorical structure to their legal reasoning and to craft an efficient and economical problem answer, while attempting to recall all the relevant principles and cases the question-setter intends they should apply.

### **Some substantive background: legal reasoning in Tort law**

Students reading through a Tort PQ will be expected to sift through the problem for a range of possible issues, but have been trained to work through a set sequence of issues that stand in a dependent relationship to each other. The first consideration, having established the area(s) within tort law relevant to the problem, is to decide if the parties in question owe any duty to the victim of the accident. If they do, then the issue is whether the standard of care is

a normal one, or whether the parties can argue that they should be excepted from that standard. If that standard applies, then the issue is “did they breach that duty of care?”. If they are found to have breached that duty, can it also be established that they solely caused the injury or harm to the victim, or contributed to that harm? And then was the damage too remote to have been foreseen by the defendant? Balanced against all of that are possible defences that the defendant might have that would enable him or her to either escape liability altogether, or to reduce it by arguing contributory negligence on the part of the victim. Put in diagrammatic terms, students are expected to place any problem against this legal reasoning framework that is applied to all negligence problems. Appendix 2 shows how the IPCAC reasoning sequence<sup>8</sup> is applied to whichever issue is relevant to the problem at hand. In this problem, the issue is simply to establish whether the defendant owed a duty to take reasonable care not to cause injury [in this case psychiatric injury, or *nervous shock*] to any or all of the five potential plaintiffs.

### **The transition from a content to a communicative focus**

After being left to apply their substantive and procedural legal knowledge to “deconstructing” the problem, the students are offered a choice of task. They can compare notes with colleagues, brainstorm an outline to an answer, or take an analytic approach, examining each successive proposition in the problem. The analytic approach allows the teacher to point out that PQs are written with very little redundant information. Just as Arts students are discouraged from underestimating the implications of an essay question, so law students need to assume that almost everything that has been put into a PQ is relevant and material in some way. To be in a position to arbitrate on a question of relevance, the EAP teacher’s preparation for each PQ must be extremely thorough; s/he cannot operate effectively without extensive substantive knowledge of the area of law addressed by the problem. Hence, the notes for teachers on such a course need to be extensive, and teachers are expected to refer to the relevant Tort text books (e.g. Jones, 1998). Providing correct answers to tasks is insufficient as a substantive resource for EAP teachers of legal rhetoric. The real test of their grasp of the relevant substantive law comes in fielding unforeseen suggestions by students, and having to advise them on their acceptability.

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<sup>8</sup> In the US, the more common acronym is IRAC, standing for Issue, Rule, Application, Conclusion.

### **Distinguishing the arguable from the unarguable**

One of the law teachers recently asked how we had been teaching PQAs, as in her marking of final Tort exam scripts she had been finding that a number of students had failed to discriminate between those issues and facts of a problem intended to prompt reflection and argument, and those that are straightforward and not intended to invite sustained analysis or speculative argument. I had already suspected that we might have been advising students to work through legal reasoning steps too programmatically. This law teacher recommended that where the facts make clear that a court would automatically accept or reject a claim on certain criteria – i.e. likely uncontestable facts - those should be glossed over very quickly. But where the facts leave open the possibility of argument, then the student is expected to offer a more detailed and balanced analysis, weighing up the strengths and weaknesses of a party's case. We had already taken this distinction on board in our advice to students, as Williams' standard text "Learning the Law" is very clear about this (1982: 113, 116), but our students seemed to lack either the confidence to omit less salient material or the rhetorical skills to foreground the salient and background the obvious. These are skills the students will need as practicing lawyers, notably as barristers. To be effective before a court, counsel need to be seen to take account of the opposition's actual or likely arguments, objections and/or defences. These same skills are clearly being solicited in the instructions in a typical PQA, which invariably asks students to advise one or more parties on the extent of their liability (as defendant), or on their chances of succeeding in their legal action (as plaintiff).

While we felt we had been giving students the right rhetorical advice and feedback, the critical comments from the Tort teacher prompted us to review our teaching of PQA writing skills. We would need to work harder at ensuring that students were able to estimate not only whether a party was likely to be successful in their claim, but to discriminate among the facts and issues and to identify what - on the facts and given the current state of the law - lay open to argument. Different teachers responded to this feedback in different ways; in this paper I discuss how I adapted my teaching of PQA writing skills. I developed a "heuristic" device that I hoped would help students both with their reasoning and the organisation of their writing.

In the problem I use as an example in this paper, there are 5 parties, and the facts are more or less favourable for each of them. I devised the following answer "template" to enable students to quickly show whether the parties fulfill - or *fail* to fulfill - the criteria that qualify them for recovery of damages for Nervous Shock. We advise them to pay particular attention to those facts or issues which might give rise to debate, that is, where the facts of the problem are not neatly analogous to those of a precedent case. Students were advised to use ticks (✓), crosses (X) and question marks (?) respectively to indicate if, in their opinion, the party did or did not fulfil the criteria, or whether the point was arguable. This scheme was intended to help students determine whether or not the parties were likely to win their action.. The table below shows the recommended "answers" (n/a = not applicable to that party):

.. .....Parties Principles*	Charles	Daphne	Elaine	Freda	George
<b>Physical proximity</b>	✓	✓	X	X	X
<b>(Close) personal relationship</b>	X(?)	X(?)	✓	✓	✓
<b>Own senses or Immediate aftermath</b>	✓	✓	✓ ?	X?	X
<b>"Horrific" (Alcock, 1991)</b>	✓ ?	✓ ?	✓ ?	✓ ?	X
<b>Rescuer</b>	n/a	✓	n/a	n/a	n/a
<b>Conclusion → likely to succeed/ fail</b>	X?	✓	✓ ?	X?	X

\* These are actually "control criteria", which parties have to fulfil to qualify as being owed a duty of care.

The most successful students are those who manage to cut through the obvious facts to the arguable and potentially critical issues (e.g. those marked by "?" in the table above), but we have found that even some of those students find it difficult to translate successful reasoning into successful writing.

## B. Legal reasoning and rhetorical structures

Identifying contentious issues is only the first step to producing a successful answer. It is at this point that the above table takes on another role, as the basis for making decisions on the structure and organisation of the problem answer. Having worked out the relevant issues, principles and precedent cases to cite – the IPCAC rhetorical functional structure – the student is ready to chart out an answer. This is where a further heuristic device can prove

useful in helping students to see the most efficient and communicatively dynamic way of structuring their answer.

***Argumentative structure: close with your concluding and main point***

Students are told that it is usual to treat each plaintiff's action separately, and to accord each plaintiff their own paragraph (or more). They are then told that it is the conclusion on each issue which should determine how they structure their analysis. This applies equally if their conclusion is

- **positive** – meaning success is *likely* –
- or **negative** – that success is *unlikely* –

As with the general liberal arts-type essay, students have the option of a more inductive or deductive type of structure. The inductive one would lay out the components of an argument and then draw a conclusion at the end, while the deductive style would begin with the conclusion, and then proceed to justify or demonstrate its logic via factual argument. How do these principles apply to the PQA legal genre? In legal problem question answers, the textbooks (e.g. Williams, 1982) unambiguously advise students to work from the facts, but how the analysis and argument are best presented have received less attention. If the argument students are to present is simple and clear-cut, in the absence of any arguable issues, then a deductive structure might be the most efficient. Howe (1990) suggests that PQAs should begin, at each action, with a “forecast” of the likely outcome. But fronting the conclusion for each party in this way may signal to the examiner that the overall issue of whether these plaintiffs can recover damages is seen by the students as an invariably straightforward one. I would argue that the strategy appropriate to a more problematic and contingent argument is to signal that complexity but to delay the conclusion. For example, taking the above analysis of Elaine's situation, if the student wants to suggest her chances of successful recovery are not high (and the facts do suggest this), then the student could begin by pointing to the problem she faces, which is persuading the court that being “*told of the accident and (seeing) Alan's burnt and mutilated body at the hospital*” qualifies that encounter with her husband's body as being in the “immediate aftermath” of the accident, a

key criterion for recovery in nervous shock. Here is a suggested PQ analysis of Elaine's case:

“Although Elaine, as Alan's wife, will be assumed to have had a close relationship of love and affection with him, her case is weakened by her absence from the scene of the accident. To qualify her shock as recoverable she will need to argue that her nervous shock resulted seeing her husband's body rather than from being told about the accident (Alcock 1991), and that she arrived at the hospital within 2 hours of the accident, a period adjudged in McLoughlin (1981) to qualify as the “immediate aftermath” of an accident”.

In this answer, because of the degree of contingency on which likely success depends, the conclusion is woven into the argument. I generally advise students to play it safe and formally conclude with a separate statement of the party's chances of success, as illustrated in the later reformulation examples, or, if the party's case is clear-cut, to begin with their assessment of the party's chances of success (i.e. either very high or very low).

### **C. Teaching language via content: from content to language**

In general then, the organizational strategy that we concentrate on in our course is the inductive one, as students are advised to try to finish their paragraph on each issue in each action with either their concluding position or their main proposition in support of that conclusion. To get to the point of broaching this dimension with the students, we make sure we have tapped the students' understanding of legal analysis, interpreting the facts and applying legal principles. In short, we start from a content perspective and ensure that students first tackle the problem through legal analysis and reasoning. We use the table above as a means of raising their understanding of analytic and interpretive strategy, identifying the material facts, the key issues, and any relevant routines that fit the area of law – i.e. procedural legal knowledge. They are then asked to write their first draft answer. There has been little attention to paragraph organization or language at this stage. This will be tackled once the teacher has read the first drafts.

At the first, draft stage, we would expect the student to have been able to say whether or not they think that a party has a case in a particular area of law and then proceed to go through

the sequence of possible issues. Typically, this would comprise the need to demonstrate that the defendant owed the plaintiff a duty of care, that she had failed to observe an appropriate standard of care and had therefore breached that duty, that she had caused the damage – both as a *causa sine qua non* (but for their action, it wouldn't have occurred) and as the *effective* cause, where there are possible competing or successive causes. If no satisfactory defences are available to the defendant, the conclusion will be that the plaintiff is likely to succeed in her action.

What follows is an analysis on legal reasoning grounds – in terms of good and bad news for a client – construing likely positive or negative conclusions or projected outcomes. The pragmatics of the situation – of a lawyer advising his client, and of a writer persuading his reader – require that arguments and counter-arguments are framed so as to make it quite clear which argument or conclusion the reader/court would accept as the correct or legally sound one. This is true of any reasoned argument, that it show balance. But in litigation it is particularly important that counsel deal with both sides of an argument, as it is incumbent on lawyers to second-guess the arguments of the other side. Not for nothing is the symbol for justice a set of scales. It is this context that places a premium on the art of *concession*.

**a) The art of concession** (conceding your opponent's argument)

It is vital for students to grasp the need to concede any facts which seem to militate against their clients' case, as these will surely be raised by the opposition. They will also gain from having demonstrated to the reader/court the soundness and comprehensiveness of their argument, by being seen to be able to afford to take account of the opponents' arguments. The EAP teacher is now ready to use the argument the students have prepared as a platform for making that argument more persuasively.

As the teacher works through the draft scripts with the students, she can now attend to issues of micro-organisation and expression. The students are offered the following advice:

- Put in **argumentative** terms, you should *subordinate* the (relatively weak) counter-evidence, and *follow* with your main (dominant) point. The “counter-evidence” is the facts or arguments which you need to **acknowledge** to show you are aware of all the facts

and their legal implications. These are, however, outweighed by the *main* facts – which determine and support your conclusion.

- Put in **grammatical** terms, you should place the “weak” counter-evidence point first as a *subordinate* clause, and save your main point for the *main* clause – which should **end** the sentence.
- Put in **diagrammatic** terms, if a conclusion is likely to be *positive* (with ✓ = positive/criterion fulfilled, and X = negative or criterion failed), the statement should culminate in the positive information – and vice versa. If we take alternative readings of the chances of the first party, Charles, our table can show one of two conclusions:

Principle	Party:-	Argument that Charles is <u>unlikely</u> to succeed	Argument that Charles is <u>likely</u> to succeed
Physical proximity		✓	✓
(Close) personal proximity		X(?)	X(?)
Own senses or Immediate. Aftermath		✓	✓
“Horrific” (Alcock, 1991)		X?	✓ ?
<b>Conclusion</b> → likely to succeed/ fail		X?	✓ ?

In the following example, I shall put the items I concede or admit first -that the client does meet one or two of the criteria – but close with the overriding evidence which points to my *negative* conclusion. A formulaic model of this sequence based on the first column above would go like this:

Although Charles meets 2 criteria ( ✓ ), he fails to satisfy 2 crucial criteria (X),  
and so is **unlikely** to succeed (X)

Alternatively, following the right-hand column above, the student may produce a *positive* analysis for Charles, where the pros outweigh the cons:

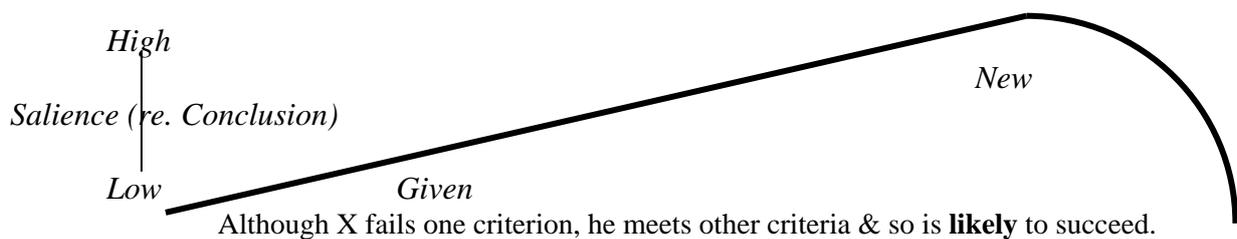
Although Charles fails to meet 1 criterion (X), he meets 3 other criteria ( ✓ ),  
and so is **likely** to succeed ( ✓ )

The most systematic way of teaching this is to take each party’s action separately and produce individual paragraphs which possess the kind of dynamic we’ve been discussing (see

“Reformulation” below for a full analysis of Charles’ case). While the more problematic of the cases would culminate in the recommended conclusion, even the more straightforward analyses should conclude with the main propositions in support of the opening conclusion. In each case the student should be able to reproduce the dynamic of end-focus I illustrate below.

### Using a “wave” to represent dynamics in communication

One way of illustrating this dynamic is through a wave model, as follows:



The wave model can be used to illustrate other ways in which “the message is moved forward” (Firbas, 1971), for example from *given* to *new* information. Statements usually begin with a topic that has been introduced, followed by some comment that adds to the picture or argument you are presenting to the reader. In concessive structures like the one above, it is usual for the subordinate clause – the adversarial viewpoint - to fill the “given position, providing the context for your own argument – the main clause. In arguing towards our own favored position, it makes strategic sense to concede points that might be uppermost in the listener/reader’s mind, and then challenge those points with our own argument. The end-focus can be seen as closing an argument with new information, or with salient information.,. For more on this dynamic perspective applied to academic discourse, notably the idea that successive statements generate more potential *given* topics with which to carry the argument forward (hence the “wave” metaphor), see Bruce (1988).

### b) Accounting for complications and contingencies

The examples given above have consisted of unrealistically uncomplicated propositions. Concessions, in particular, are rarely straightforward in authentic legal discourse, as there are usually complications that need accounting for. For a point to be worth arguing over, these complications often take the form of circumstantial, conditional or contingent factors. As we saw in our table of the nervous shock problem, there are a number of points which are either

- “**arguable**” - but which could turn out *positively* for the client, or
- “**doubtful**” - i.e. likely to turn out *negatively* for the client.

This dimension takes students closer to an appreciation of how a detailed understanding of the law needs to be combined with the ability to harness that to an effective, even sophisticated, argument. In legal discourse, such contingent factors might be called “provisos”. The rhetorical pattern can be illustrated as follows:

Positive (✓): **arguable**, signaled through the addition of “*providing X can show ...*”

Negative (X): **doubtful**, signaled through the addition of “*unless X can show ...*”.

At this stage the students are ready to be asked to apply these principles and models in more holistic exercises, in authentic legal problem-solving tasks where the interpretation of likely outcomes may go either way, depending on the persuasiveness of counsel [for more on this, see Williams pp. 112-124].

### **Reformulation**

Once students have finished struggling with the legal content, and have been introduced to linguistic devices for organising information at the paragraph and complex sentence level – all part of a process approach to writing the PQA - they are ready for a more holistic revision task. This calls on them to *reformulate* whole paragraphs, thus combining their sense of what content should be included, how the reasoning should be structured, and how to realize that structure linguistically. “Reformulation” was introduced by Joan Allwright et al. (1988, and R. Allwright et al, 1988) as a more embedded and holistic means of working on students’ writing problems. Allwright was concerned that teachers tended to spoonfeed their students with model solutions they themselves had worked out, thus “militat(ing) against the development of writer autonomy” (1988: 109). In the reformulation approach, students are offered whole texts – from the paragraph upwards – to improve as pieces of contextually appropriate communication. This vehicle offers students a way of combining communicative and reasoning principles in a practical exercise. In Hong Kong’s monolingual context, nearly

all our students share the same Cantonese-to-English problems, and so tend to be able to identify with the student examples chosen for reformulation.

Charles' action offers us an interesting reformulation task, illustrating nicely how content, reasoning and language come together in a synthetic and holistic task. To re-cap, the facts relating to Charles are as follows: "*Alan was burnt to death in a car accident caused by Brian's negligence. (2) Charles and Daphne witnessed the accident...*". The contingent elements emerge through an understanding of the relevant issues involved, and the student's task is to organize her understanding as efficiently and persuasively as possible. Depending on her interpretation of the likely outcome, the options can be set out as follows:

- **Negative outcome:**

Although X ( ✓ = positive), Y (X = negative) and, **unless** Z, Charles is **unlikely** to succeed

E.g.: "*Charles was a bystander, but even though he can claim physical proximity to the accident, he has no (demonstrable) close relationship with Alan. So **unless** he can show either that he did have a close relationship with Alan, or that, following Alcock (1991), the accident was sufficiently horrific to cause nervous shock to a person of reasonable fortitude<sup>9</sup>, Charles is unlikely to succeed in his claim to be owed a duty of care in nervous shock*".

- **Positive outcome:**

Although X (negative, Y (positive) and, **providing** Z, Charles is **likely to\*** succeed

E.g. "*Charles was a bystander, so even though there is no (demonstrable) close relationship between him and Alan, he can claim physical proximity to the accident. **Providing** that he can show that the accident was particularly horrific (Alcock, 1991), as the facts tend to suggest, he may\* succeed in his claim to be owed a duty of care in nervous shock*".

[\*Note: in legal terms, "likely" is too optimistic in the context of this argument )

I have found that working through problems of this kind with students has obliged me to re-think my ideas about how language works in extended texts, and how best to teach writing beyond the sentence level. In the next section I suggest how some of these strategies can be applied to other EAP teaching contexts.

## 5. Applications to other areas of EAP

Although the ideas presented in this paper have their roots in work I have done in other areas of EAP, notably for Social Sciences students, grappling with the challenging area of law has given me the opportunity to re-think or refine those ideas. Each discipline and disciplinary genre has thrown new light on the way I have approached the teaching of writing. I have come to focus much more on the students' assignments, as central to their – and their teachers' – perspective on academic writing. The “rhetorical spectrum” I applied to legal genres emerged from treating those assignments as coherent genres, and I have since attempted to apply the same approach to the more standard academic genres of essays and reports. Appendix 1 shows how I applied the same principles and approach to the comparative review essay – essays which give prominence to a critique of relevant literature. I now focus more on the role of the language of concession and contingency in those assignments than I used to.

The teaching points about end focus and communicative dynamics can also have a wider application. In the language of logical argumentation, students are advised, in the interests of economy, elegance and "dynamism" of expression, to save their conclusion for the culmination of their paragraph. If they can do this in a complex sentence, so much the better - but we do not oblige students to attempt such conciseness. The main advice is that they concede the counter-evidence -that the client does or does *not* meet one or two of the criteria, but that the most powerful evidence is that which points to *your* conclusion.

The teaching points I make in the law course combining concessions and contingency can be summarized as follows:

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<sup>9</sup> Judges in later cases such as *McFarlane* (1993) have ruled that secondary victims should not succeed on this

**Rhetorical patterns:**

Although √ (positive), **X (negative)** [and so (likely) conclusion **Negative**]  
and  
Although **X (negative)**, √ (positive) [and so (likely) conclusion **Positive**]

This can be applied to Charles' case as follows:

Although √ (Charles meets this criterion), **X** (he fails to meet this other criterion)  
= so **X (unlikely to succeed)**  
Although **X** (Charles fails to meet this criterion), √ (he does meet this key criterion)  
= so √ (**likely to succeed**)

And a more complicated version would go as follows:

Although √ (positive), **X** (negative) and so, unless Z, Charles is **unlikely** to succeed  
Although **X** (negative), √ (positive) and so, providing (that) Z, Charles is **likely** to succeed

I suggest that these organizational strategies would be useful to students attempting to summarize their arguments in the conclusion to an essay in almost any discipline. The “wave” model is an additional device that might help reinforce the idea of a dynamic quality to argumentation.

My experience with these PQAs has prompted me to reflect on the structure of answers to essays questions in general. Perhaps essay questions that ask a student to agree or disagree with a proposition might be interpreted as soliciting an early response and a deductive support of that position, whereas a more complex question rich in contingent factors, perhaps out of respect for that complexity, may be expected to solicit a considered and balanced analysis and argument before arrival at a tentative conclusion.

Reformulation has great potential for tertiary students whose intellectual grasp of the content surpasses their ability to communicate their intended meaning. As Allwright says, ESL-medium students' need to produce “independent writing” is ill-served by approaches which have the teachers doing the bulk of the analytical or forensic legwork, and producing target models texts for the students (1988: 109). Allwright goes beyond

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basis. This is another example of why EAP teachers need to remain up to date in the content area in question.

her strategy of getting students to reformulate their own texts with her agenda for students “to accept responsibility for editing, correcting and proof-reading their own texts” (1988: 110). This agenda implies the need for students to take ownership of the means by which their writing is to be judged. In an ESL-medium academic context, I would argue that this can only be done by balancing and integrating attention to language and content, by ensuring that any EAP course for students keeps a clear sense of that integration, and of the kind of language-content spectrum discussed earlier. This emphasizes the intermediate roles of procedural knowledge and reasoning patterns, and the importance of attending to language in terms of both key rhetorical structures and larger argumentative patterns. It also points to the need for EAP courses to feature peer and auto-evaluation more prominently, especially in writing-centred curricula.

### **Ownership of content and structure can compensate for weak language skills**

The final issue in courses like this in an ESL-medium university is "how much difference does the EAP course make ?". The Tort teachers have frequently remarked that since our course got into its stride, the standard of the students' Tort assignment answers has improved markedly. The course has also proved popular with the students, since it clearly helps them address the problems of tackling complex legal assignments which feature intricate acts of interpretation , of structure and of rhetorical execution. Howe makes the point of a Chinese-L1 student of law:

"(he) can allow the accuracy of his English to disintegrate quite substantially under the pressure of a test, so long as he has the accepted schema and discourse, clearly indicated by plentiful signalers" (1990: 233)

The kind of disciplinary "signaling" the EAP for Law teacher needs to become familiar with are different from the time-honored logical connectives taught for non-specific argumentation or exposition. There is a great deal that is different about legal discourse, but also much that can enrich our understanding of discourse in other domains. We might not go as far as Swales in advising EAP teachers that "being a native speaker is not enough; there must be an apprenticeship to the genre"(1986: 18, cited in Howe, 1990: 235). But I have certainly formed the opinion that in order to undertake the kind of WAC or EAP commitment needed to command the respect of both students and teachers of

professional disciplines like Law, ESL teachers need to make some hard choices about the legal reading they are prepared to undertake, when preparing to take on a course like this, and when marking each batch of PQ assignments.

## **6. Conclusion**

In this paper I have tried to show how an adjunct-type EAP course can dovetail language and content in ways which lead to a continual enrichment of the English teacher's understanding of the relationship between language and the target "content". I have tried to show that while this makes considerable demands on the teacher, it can be professionally enriching, stretching the teacher's understanding of the dynamics of disciplinary discourses. I have tried to suggest that EAP teachers can benefit most from a teaching portfolio that allows them to combine in-depth discourse analysis with the opportunity to teach students in more than one discipline. Breadth of experience of disciplinary discourses can renew a teacher's ideas about teaching the rhetorical principles, functions and structures students need to give communicative realization to their ideas and arguments.

The balance between language and content in such a course is a delicate one. Ruth Spack (1988) raised the issue of the demands on their content knowledge that a rigorously developed adjunct course would make of ESL teachers. She warned of the importance of not underestimating the work involved, and the strain this might make on the language teachers charged with teaching such a course. My experience in what is admittedly a fairly large EAP teaching operation (30 teaching staff) has tended to be a positive one. I have found that you can gather a group of teachers who volunteer to work together to build a collective knowledge base which is more than adequate to the needs of the students and the "adjunct" materials. At the same time, there should always be space for saying "I'll need to check that with the subject tutor". EAP teachers should be wary of being lured into pretending to an infallibility on questions of legal content. It is moot, of course, as to whether they should pretend to infallibility on anything, including their linguistic judgments.

A quite different danger lies in EAP teachers building up an expertise in an area of legal content and reasoning. After teaching this kind of Tort-adjunct course a number of times, teachers can become so adept at the corner of the Law they have mastered that it is tempting to set up shop as a supplementary tort tutor, teaching what is most popular (because instrumentally relevant) with the students. One danger here is that one is tempted to weight the assessment of students' assignments too heavily towards their grasp of the law. Such an approach can not only lead to a course losing coherence, but can also undermine the distinctive role EAP teachers bring to the partnership, an issue of professional "content validity". In times of budget constraints, an EAP program needs to demonstrate that it is contributing something to the students' curriculum that the Law Faculty themselves do not have the funding, or the disciplinary expertise, to provide.

In order to maintain that breadth of competence, I suggest the obvious: that it is advisable for EAP teachers to ensure that they remain up to date not only in the disciplines of their students – however narrow the niche - but in the broad field of EAP. Developments in the tertiary English teaching context in Hong Kong suggests that it may be increasingly difficult to sustain this level of research and professional renewal. Under the pressure to compete for research funds, institutions are beginning to split research into language away from the service teaching of EAP, by creating a two-tier system of higher-status academic linguists, and lower-status language teachers. This seems to me to be a result of a failure to understand the close relationship between language and other kinds of knowledge, but also possibly a failure within our own broad profession to stand up and resist the institutional imposition of such a divide. I suspect this is an issue which will resonate in other teaching contexts. I suggest that the kind of work reported in this paper needs to continue to be conducted by EAP professional who resist attempts to divide teaching from research, and language issues from content issues.

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**Appendix 1:**

**Integrating Academic Rhetoric with Disciplinary Study Skills,  
Reasoning and Interpretation**

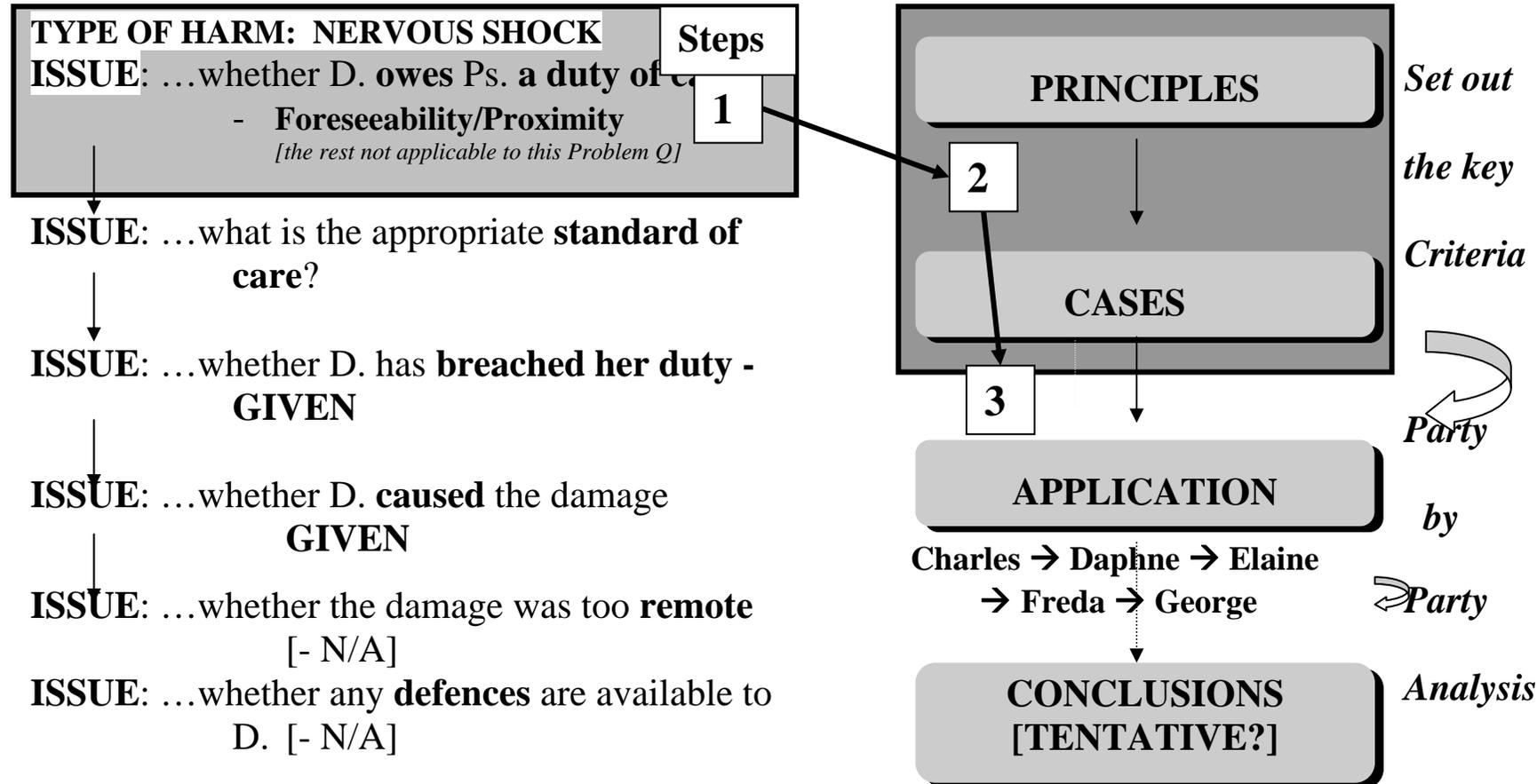
**A Functional Framework for Review Essays  
[for students of the Arts and Social Sciences]**

SPECTRUM: *DISCIPLINARY* ←————→ *LINGUISTIC*

Assignment Genre	Study Skills [Content focus]	Macro-Structural “moves”	[Micro-] Rhetorical Functions	Rhetorical Structures [Language]
<p><b>Review Essays</b></p>	<p><i>[Reading skills]</i>  <b>Locating</b> key                      Literature or information</p> <p><b>Reading</b>                      articles, review essays, book reviews,</p> <p><b>Extracting</b>                      key information</p> <hr/> <p><i>[Writing skills]</i>  <b>Interpreting</b>                      the question</p> <p><b>Structuring</b>                      an essay</p> <p><b>Writing the essay</b></p> <hr/> <p><b>Revising</b>                      an essay  <i>[Post-feedback]</i></p>	<p><i>[Writing]</i>  <b>Introduction:</b>                      Reflect on title/question;                      State position and/or                      Signal intentions or aims</p> <p><b>Main body:</b>  <b>Attention to:</b>                      Argument sequence,                      Topic control, paragraph linking</p> <p><b>Conclusion:</b>                      Summarize main argument/                      conclusion(s);                      Recommend future action/research</p>	<p><i>[Intro.]</i>                      Identify topic or problem                      Problematize or state significance of topic/problem                      State aim, position or strategy;</p> <hr/> <p><i>[Main body]</i>  <i>E.g.:</i>                      State idea/position 1;                      List arguments for and then against;                      Evaluate &amp; conclude;  <i>Move to arg’t 2..</i>                      etc.....</p> <hr/> <p><i>[Conclusion]</i>                      Concession:                      balanced summary but opt for one position or another</p>	<p><i>[Any number]</i>                      There have been..                      ... has become...                      There are 3...                      One of the most important...                      The main problem with X...                      In this essay I propose/intend to</p> <p>Some theorists/ writers argue that X...                      A growing number of researchers are suggesting that...</p> <p>On balance, it seems that...                      Although there is some evidence that ..., most recent research points to ...</p>

**1 Issue, 1 Area of Law,  
 & 5 Parties**

**Strategy:** 1.. Set out the type of harm, actions in view  
 2. Set out the criteria for recovery in NS (D of C.)  
 3. Follow the IPCAC analysis for each party:



### Appendix 3: A “model” answer to the sample Nervous Shock problem question

“Liability for nervous shock is now considered in the light of the decisions of the House of Lords in *McLoughlin v. O’Brian* (1982) and *Alcock v Chief Constable of South Yorkshire* (1991). These interpreted liability in Nervous Shock in terms of the issues of foreseeability of injury and proximity to the accident and its victim(s), and noted that nervous shock means actual mental injury or psychiatric illness, and not mere grief and sorrow. Page v. Smith (1995) made the useful distinction of proximity between *primary* and *secondary* victims of accidents: primary victims are either injured themselves, put in fear of their own safety, or fear they have caused the injuries to the primary victim(s). Secondary victims are bystanders who are not so closely affected by the accident. In *McLoughlin* Lord Wilberforce held that there was a need for the law to place some limitations on claims by secondary victims, and in *Alcock* the House of Lords adopted Lord Wilberforce’s approach, which was that a plaintiff could only recover for nervous shock if :-

- (i) his relationship to the primary victim was sufficiently close to make it reasonably foreseeable that he might suffer nervous shock (normally parents, children and spouses);
- (ii) his proximity to the accident or its immediate aftermath was sufficiently close in both time and space; and
- (iii) he suffered nervous shock through seeing or hearing the accident or its immediate aftermath.

The House of Lords in *Alcock* additionally extended the class of persons eligible to recover for nervous shock to bystanders who witnessed a particularly horrific catastrophe, though McFarlane 1994 later narrowed this scope by introducing the notion of “ordinary fortitude” in face of a horrific accident. Chadwick (1969) established a special status for rescuers, but more recently *White v Chief Constable of West Yorkshire* (1999) has narrowed the criteria for rescuers, requiring the claimant to have been in personal danger of injury, and hence classified as a primary victim of the accident. Turning now to **the parties** in question in this case:

“**Charles** was a bystander, but even though he can claim physical proximity to the accident, he has no (demonstrable) close relationship with Alan. So unless he can show either that he did have a close relationship with Alan, or that, following *Alcock* (1991), the accident was sufficiently horrific to cause nervous shock to a person of reasonable fortitude, he is unlikely to succeed in his claim

**Daphne** is also apparently a mere bystander but she is also a rescuer. Although she has no ostensible close relationship of love and affection with Alan, *Alcock* expressly preserved the right of rescuers to recover, as in *Chadwick*, since the presence of a rescuer is reasonably foreseeable. However, the recent *White v Chief Constable of West Yorkshire* (1999) decision to require rescuers to have been in personal danger of injury means that her status simply as a rescuer is no longer certain to ensure recovery.

Although **Elaine**, as Alan’s wife, will be presumed to have the requisite relationship of love and affection with Alan, she only heard of the accident and saw Alan’s body at the hospital later, so following *Alcock*, this would be insufficient to qualify for compensation, even though the “burnt and mutilated” nature of Alan’s body could be argued as constituting a “horrific” sight. However, Elaine may still recover damages if she can show that she arrived at the immediate aftermath of the accident as set down by Lord Wilberforce in *McLoughlin*, where recovery was allowed where the plaintiff came upon the aftermath of the accident within two hours of that accident.

As with Elaine, **Freda** will be presumed to have a relationship of love and affection with Alan. In *Alcock* it was suggested that a plaintiff might, under certain circumstances, recover for nervous shock suffered as a result of witnessing an accident on live television (although on the facts of *Alcock* recovery was disallowed). However, Freda must show that her nervous shock was reasonably foreseeable, and this is unlikely since the television transmission was not connected with Brian’s driving but with the redundancies at the nearby factory. In *Alcock*, by contrast, the viewing of the football match on television by close relatives of the persons injured was foreseeable. Also, there needed to have been a recognisable image of Alan’s body for the Broadcasting company to have been actionable for failing to observe their code of practice in these circumstances. Thus, it seems that Freda will fail at the first hurdle, namely reasonable foreseeability.

Again, like Elaine and Freda, **George** has the necessary close relationship of love and affection with Alan. But George’s problem is that he neither witnessed the accident nor its immediate aftermath, and so following *Alcock* he cannot recover.”

[adapted from Green (1995: 33-39)]