Picking up the principles: An applied linguistic analysis of the legal problem genre

Colin J. Beasley

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Picking up the principles: An applied linguistic analysis of the legal problem genre

by

Colin J. Beasley


A thesis submitted in partial fulfilment of the requirements for the award of

Master of Arts (Applied Linguistics)

Faculty of Arts, Edith Cowan University.

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Legal study requires not only the learning of new content, but also the learning of a new academic discourse with its own lexico-semantic, syntactic, and discoursal features. This thesis explores the answering of legal problem questions as an important and distinct new genre that undergraduates studying law units need to achieve competence in. In order to delineate the general features of this genre, systemic functional linguistic (SFL) analyses were performed on a series of texts (a tutorial question, an assignment question, and an examination question) written by lecturers in the introductory Commerce course *Principles of Commercial Law* as exemplars of the answering of legal problem questions. SFL analyses were also conducted on a series of student texts (both native and non-native English speaking students' answers to the examination question) which showed that considerable difficulties exist not only with the content, but also with the linguistic demands of writing in this particular genre. It follows that students may require specific training in "picking up the principles". The pedagogical implications for both content and language staff teaching in this area are explored with particular reference to tertiary ESL/EFL students.
Declaration

I certify that this thesis does not incorporate without acknowledgement any material previously submitted for a degree or diploma in any institution of higher education; and that to the best of my knowledge and belief it does not contain any material previously published or written by another person except where due reference is made in the text.

Signature

Date ........... 26. 8. 94

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Acknowledgements

When I began to jot down the names of a few people that I wished to acknowledge for their help, I suddenly became aware just how many people I actually owe a debt of gratitude to. The list that follows is thus rather large and if I miss some people out who are deserving of public acknowledgement, I apologise now for my oversight.

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Colin Beasley, Academic Services Unit, Murdoch University, W.A.
CHAPTER 1

INTRODUCTION

1.1 Background to research

In recent years there has been growing awareness of the extent of the adjustment that all students have to make in the transition from high school to university. Students have to adjust to a new cultural milieu, the culture of the university, which also contains within it a host of disciplinary sub-cultures, tribes and territories (Becher, 1989) or discourse communities that the apprentice scholar will meet and interact with and each of these has its own rules and conventions and ways of constructing knowledge.

In the Australian context, the last decade has also seen an enormous growth in the marketing of full-fee education (particularly, tertiary) to students from other languages and cultures, chiefly from South-East Asian nations. Indeed, there has been rapid growth world-wide in the English for Academic Purposes (EAP) and English for Specific Purposes (ESP) areas in the last 15-20 years to meet the needs of students for whom English is a second / foreign language (ESL/EFL) studying or preparing to study a wide range of disciplines at tertiary level in English. While many linguistic studies have been conducted and syllabuses and course materials published and evaluated particularly in the area of English for Science and Technology and English for Business Purposes, comparatively few studies have been conducted and virtually no syllabuses and course materials published¹ and made available for non-native students studying law in English.

The study of law often involves making fine distinctions based on the interpretation of language and competing points of view and thus poses linguistic and learning challenges for all students, but particular problems for students from non-English language and cultural backgrounds. Students have not only to learn “a new language”, the language of the law with its peculiar terminology and discourse, but they also have to adjust to a different way of thinking and develop new learning styles to understand the principles and complexity of legal interpretation and argument. As one law lecturer puts it, “understanding the way in which language is used to explain the logic behind legal arguments requires the re-orientation of thought patterns” (Yamouni in Crosling and Murphy, 1994: v).

¹This need has only very recently been addressed locally by the publication of a handbook entitled How to study business law: Reading, writing and exams by Crosling and Murphy (1994).
Katter (1989), in a paper examining the cultural difficulties that confront overseas students learning law in Australia, contrasts Asian and Western traditions regarding knowledge, the printed word, rote learning, and the lecturer-student relationship. As Katter points out:

The difficulty for many overseas students lies in the conflict between their cultural background and the very nature of studying law. ...[This] requires the ability to analyse logically, to understand principles and have the ability to apply those principles to any given factual situation (p.15).

Thus, learning the law also involves a great deal of culture-specific knowledge because as Swales (1982: 139) observes, a country's "legal systems and Penal and Civil codes are expressions of national sovereignty (and so tending to reflect local social customs and moral and religious beliefs)". The paucity of materials available for the teaching of English for academic legal purposes (EALP) is a reflection of "this national particularity of legal studies" according to Swales (ibid).

Assessment in law is often based largely around ability to adequately answer the legal problem style question, which is a completely new form of discourse in which there is little scope "for regurgitating rote-learnt material in essay form" (Katter, 1989: 16). All students would thus be expected to have some problems learning the language and logic of the law and adjusting to the genre demands of academic legal English in particular. Overseas and migrant students, however, may experience extra difficulty because of the high level of linguistic competence in English needed in a subject that requires the making of fine distinctions based on the precise meanings of words, as well as the understanding of many abstract principles and concepts and the ability to interrelate them and to think and reason in the Western (and more specifically, British) legal tradition.

Not surprisingly, the first year introductory law course for Commerce1 students - *Principles of Commercial Law (C165)* - has proved problematic for many students and especially non-native speakers of English. The failure rate during the first year it was offered was reportedly as high as one in every three students (P. Sinden, 1986, personal communication). Even allowing for the possibility that some of this could have been related to teething problems faced by a new course and possibly unrealistic expectations by law staff of first year non-law students, these figures are still cause for considerable concern.

The author, as a lecturer in English as a second language, has consequently been involved for a number of years in conducting voluntary language and learning support

---

1The Commerce program has consistently been the choice of the majority of overseas students at my university since the inception of the full-fee paying program.
classes for C165 students in conjunction with the course content lecturers. This has, of course, frequently led to him attending lectures, reading course texts, and having regular discussions and consultations with the law lecturing staff in an attempt to come to grips with this discourse community and provide appropriate and meaningful support classes. This research has been motivated by a desire to better inform pedagogical practice and its first stage involved the conducting of a questionnaire and interview study of students who had difficulty with the C165 course in order to see how the students themselves perceived the difficulties of studying this course.

1.2 Students' perceptions of problems

Students of the first year Commerce course Principles of Commercial Law (C165) who failed the examination component, i.e. scored less than 30 out of 60 marks in the final exam, were contacted by mail by the author and invited to discuss their exam results and experiences with the course. Unfortunately a number of students, especially a number of overseas students who had returned home for the long Christmas - New Year break, could not be interviewed because it was university vacation. At the interview, students were asked to complete a questionnaire about their experiences with C165 (See Appendix 1, p. 243). Students were given an opportunity to peruse their exam papers as well as to make further comments on any aspect of the C165 course. Appendix 2 (p. 245) gives the detailed results of the questionnaire study while the discussion that follows is a summary of its findings. The student responses cited have been edited but have not been corrected for grammar or spelling etc.

Of the 26 students interviewed, only one had any prior experience of legal study (Q.1). Sixteen of the students were native English speakers (L1) while the other ten were native speakers of an Asian language (Chinese, Indian, or Malay/Indonesian), i.e. they were bi- or multi-lingual and English was a second language (L2) for them (Q.2).

Whilst about a third of the native speakers felt that the C165 course was more difficult than their other subjects (Q.3), nearly all (80%) of the L2 speakers found it to be harder than their other subjects. Some L1 students expressed difficulty with the difference in "style" of legal discourse particularly with regard to assignments and exam answers:

* The essay writing was different and made it hard to determine what was required.

---

1. This study has previously been reported as part of a conference paper presentation and published in Betsley (1993).
2. A Malaysian ESL student who had studied Business Law in a Diploma course.
I personally found it harder, my other subjects were quite similar in subject matter and style to my TEE\(^1\) subjects...

...difficult to express the factual-like information learnt throughout the semester into an appropriate exam answer.

The L2 students, on the other hand, commented on the difficulty of the language and concepts themselves as well as the demands of memorising a large number of cases and facts and the need to develop analytical skills:

- Legal language - grammar (sic). Most importantly students should be warned that a DICTIONARY meaning does not explain the formal *legal* meaning.

- difficult in understand the concept (sic)

- I need to memorize cases and the legal concepts instead of just understanding them like in other subjects.

- lots of facts to be memorised

- ... a lot of cases to study

- harder for me to understand concepts

- ... more analytically (sic) skills compared to other introductory courses, but luckily it's more interesting as well.

- ... a lot of words or terms that are very difficult for me to understand.

Not surprisingly perhaps, nearly all students interviewed expected to pass the unit (Q.4). Most students believed they had done enough work to pass. All, except one L2 student, failed the exam, however. When the other components of the course were included (assignment, tutorials, mid-semester test), ten of the L1 students managed a pass grade overall, while the remaining five failed the course. Of the ten L2 students, there were two passes, two conceded passes, and five fails with the student who passed the exam achieving a credit grade overall.

Regarding the difficulty of the lectures (Q.5), the responses of the two groups were in marked contrast. Most L1 students did not experience difficulty with the lecture situation (84.4%) whilst half the L2 students did. Some L2 students commented on the need to prepare beforehand for the lectures as well as having difficulty with legal language:

- because you must read before the lecture, otherwise you will lose the interest. (sic)

- the lecturer often just explained the concepts very briefly, expecting us to be prepared before the lecture. Even if we were prepared, I think it is a bit difficult.

---

\(^1\) TEE stands for Tertiary Entrance Examination in Western Australia, i.e. the matriculation or university entrance exam.
* Because some words or items are difficult to understand.

* Yes and No. Just some legal vocabulary was new to me... and am not used to lateral thinking.

Responses to the tutorial situation (Q.6) were remarkably similar, however, with roughly 40% of L1 and L2 students expressing some difficulty there. A number of students expressed difficulty in following the course of the discussion, while others (including native speakers) expressed difficulty in participating in tutorials:

* ... the tutor went into great details about the concepts and I lost track of what was happening and where we were going. (L1)

* the actual answer plan to questions - applying legal principles. (L1)

* Because you had to participate quite vocally and I'm not the most vocal sort of person. (L1)

* as I never really was in the tutorial discussion and it too began to get hard to follow although I did gain more understand (sic) of the course through them. (L1)

* Once again we have to be prepared... However, often the lecturer's attitude was 'intimidating' on the students. (L2)

* wasn't sure how to answer questions. (L2)

* because they teach too fast. (L2)

* The lecturer ... used to "beat around the bush" in trying to explain a specific point of law. (L2)

The responses to Question 7 revealed considerable divergence between L1 and L2 students' experiences with the course textbooks. Whereas only about 20% of native speakers admitted having difficulty with the course texts, 80% of the L2 students found difficulty with them. Most students appeared to find the main textbook (Paul Latimer’s *Australian Business Law*) to be well organized but many commented on the jargon, "lawyer phrases", and tedious language:

* It was a law book which used very vague (sic) terms and 'lawyer phrases' which was hard to follow to a certain extent. (L1)

* It was just a matter of sitting down reading and concentrating. (L1)

* Latimer contained extended long sentences which used words that required some knowledge of law. (L1)

* The language used was very high... (L2)

* Some cases are hard/difficult to understand and follow. (L2)

* Often, jargons (sic) a lot, specific use of language tedious sometimes but overall textbook is well organised. (L2)
Not surprisingly, the majority of both groups found the exam to be difficult (Q.8). Most students reported difficulty in analysing and adequately answering the "tricky" or "not straight forward" legal problem questions in the exam with some commenting that there had not been enough practice given in "answering exam type questions":

* I hadn't really been in a situation in which we had to apply the legal information we had learnt in the course. (L1)

* Being only 3 questions there was no room for error. Understanding the progression of the cases which I was required to analyse was difficult. (L1)

* Exam questions seemed to be very vague. Need more practice answering exam type questions, possible for assessment throughout the course so you have an idea what to write. (L1)

* Because question is not straight forward. (L2)

* I didn't find it hard. The only problem was it was very tricky. I realised this after the exam from a friend, then I came to discover that some of my answer was inaccurate. (L2)

* It was a bit difficult from the past 2 or 3 years. It wasn't very straight forward cases... (L2)

In Question 9, students were presented with twelve aspects of legal study and asked to identify those areas that they experienced difficulty with in the C165 course. This question was based on a list of nine types of problems that Davie (1982) identified students as having when studying law. Students were also asked to rank the twelve problems in order of importance (from 1 to 12, most to least important). The combined results for this question have been set out in Table 1.1 below.

Overall, three areas were identified as being problematic for most students: namely, (xi) organising answers to legal problem questions (L1=75%, L2=60%, Total=69.2%), (vi) identifying the area(s) of law at issue in a case or problem question (L1=68.75%, L2=40%, Total=57.7%), and (i) legal language at the lexical level (L1=50%, L2=70%, Total=57.7%). A further four were identified as problems for about half the students: (ii) the grammar and structure of legal language (L1=37.5%, L2=70%, Total=50%), (iii) the rhetoric and logic of the judge's argument in cases (L1=21.9%, L2=100%, Total=51.9%), (xii) identifying when more information is needed to fully answer a problem question and the difference this would make to the answer (L1=50%, L2=50%, Total=50%), and (x) citing relevant cases when answering legal problem questions (L1=56.25%, L2=30%, Total=46.2%).

There was considerable divergence between L1 and L2 students, however, in their rankings and their Yes/ No responses (ie. whether they identified it as a problem or not) with regard to items (ii), (iii), (vi), and (x). Examination of Table 1.1 reveals that the development of more effective analytical and discourse organisational skills is the
perceived priority for these L1 students in studying law, whereas the lexical, syntactic, and discourse features of legal language assumed greater importance for L2 students.

**TABLE 1.1: Question 9 (in terms of student rankings)**

Did you experience problems * with any of the following in C165?

<table>
<thead>
<tr>
<th>RANKING (1=most import, 12=least import)</th>
<th>L1</th>
<th>L2</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>(xi) organising answers</td>
<td>X=4.4 (S.D.=3.3)</td>
<td>X=1.8 (S.D.=3.4)</td>
<td>X=4.9 (S.D.=3.4)</td>
</tr>
<tr>
<td>(x) citing relevant cases</td>
<td>X=4.9 (S.D.=3.6)</td>
<td>X=4.8 (S.D.=3.6)</td>
<td>X=5.2 (S.D.=3.2)</td>
</tr>
<tr>
<td>(vi) identifying areas of law</td>
<td>X=4.9 (S.D.=3.3)</td>
<td>X=5.5 (S.D.=2.3)</td>
<td>X=5.5 (S.D.=3.5)</td>
</tr>
<tr>
<td>(xii) identifying more info needed</td>
<td>X=6.1 (S.D.=3.6)</td>
<td>X=5.6 (S.D.=4.6)</td>
<td>X=6.1 (S.D.=3.8)</td>
</tr>
<tr>
<td>(vii) understanding significance of case</td>
<td>X=7.0 (S.D.=2.4)</td>
<td>X=6.1 (S.D.=3.3)</td>
<td>X=6.5 (S.D.=4.2)</td>
</tr>
<tr>
<td>(i) grammar &amp; structure legal language</td>
<td>X=7.0 (S.D.=3.6)</td>
<td>X=6.25 (S.D.=3.8)</td>
<td>X=6.6 (S.D.=2.4)</td>
</tr>
<tr>
<td>(iv) identifying ratio decindendi</td>
<td>X=7.3 (S.D.=3.4)</td>
<td>X=7.3 (S.D.=3.8)</td>
<td>X=7.3 (S.D.=3.5)</td>
</tr>
<tr>
<td>(i) grammar &amp; structure legal language</td>
<td>X=7.1 (S.D.=3.9)</td>
<td>X=6.4 (S.D.=2.6)</td>
<td>X=6.75 (S.D.=3.3)</td>
</tr>
<tr>
<td>(v) differentiating material from non-material facts</td>
<td>X=7.6 (S.D.=2.8)</td>
<td>X=8.75 (S.D.=2.8)</td>
<td>X=7.65 (S.D.=2.95)</td>
</tr>
<tr>
<td>(v) differentiating material from non-material facts</td>
<td>X=8.9 (S.D.=3.2)</td>
<td>X=9.1 (S.D.=3.0)</td>
<td>X=9.0 (S.D.=3.1)</td>
</tr>
</tbody>
</table>

* (xi), (vi), (i) identified as problems for most students.
(ii), (iii), (xii), (x) identified as problems for about half the students.

** considerable divergence between L1 & L2 students in their rankings and Yes/No responses (ie. whether a problem or not).
It is not that these L2 students do not need also to develop their analytical and organisational skills, but that they are more focussed on the problems they are having coming to grips with the language of the discipline itself. The language often acts as a barrier to understanding the concepts or principles (CONTENT) of the subject.

On the other hand, native speakers did have some problems with the lexico-syntactic demands of the subject:

- The legal jargon was difficult to fully comprehend.
- Language appeared old-fashioned which provided some difficulty.

However, they were more concerned about the difficulties at the discourse and analytical level with the course content, namely analysing situations and identifying the legal issues involved (and when more information is needed) and then organising "appropriate" answers to these legal problems by defining and applying relevant legal principles and citing relevant case authorities. Pertinent L1 student comments included:

- It was hard to know where to begin.
- I sometimes felt that my answers weren't structured correctly.
- Sometimes it is confusing as to which are the most important points.
- There were a lot of cases to know and they get confused together.
- Unsure how to write the answers. What format to use.

In response to the final question as to whether they had any useful advice to offer future students in the course, most students responded with comments which highlighted the need to study hard and consistently and to fully make use of all learning opportunities by preparing for lectures and participating in tutorials. Additional comments often centred on the need for more guided practice with answering legal problem questions during tutorials so that students are more adequately prepared for the assignment and final exam:

- Had some problems writing legal English. One or two practice sessions in the first 4 weeks structuring answers to legal problem questions rather than tests would have helped a lot. (L1)

- In the exam, I didn't know where to start and how much detail to go into. Not enough practice in tutorials at doing problem questions especially writing out answers. (L1)

- We were not told about structuring answers before the assignment. The assignment is completely different from essay question. (L2)

- Would like more helpful handout of more case analyses. Each tutorial only had time to answer 1 or 2 cases. (L2)
This survey, with all its limitations in terms of sample size and the sometimes large discrepancies in student perception as witnessed by some quite large standard deviations, strongly suggests that both native and non-native English speakers are aware of a number of the features of the language of the law as potential problems in comprehending or producing legal discourse. Non-native speakers are more aware of problems at the lexical level and clearly they do not have the linguistic resources at their disposal per se as most native speakers and this is perhaps most obvious at the level of lexis. Native speakers, on the other hand, are more cognisant of the differences and difficulties at the discourse level and the need for more practice at developing competence in the genre of the legal problem question.

As the majority of the questions in the final examination (which comprises 60% of the marks for the CI65 course) are legal problem questions, combined with the fact that the major assignment (worth 20%) is usually also of the legal problem type as indeed are most of the tutorial discussion questions (worth another 10%), it is clear that both understanding and demonstrating competence in this type of discourse is the major determinant of success in this course. However, it is a new form of discourse for nearly all students unless they have studied a law subject previously. Furthermore, as the above survey reveals, many students experience difficulty with it and feel the need for more practice and explicit instruction. As this research is motivated by a desire to provide better and more effective assistance to students studying law, the answering of legal problem questions is of crucial importance in this endeavour and consequently forms the focus of the present research.

1.3 Aims & thesis outline

1. To delineate in detail the characteristics of structure, form, and purpose of the legal problem genre by analysing model or suggested answer texts written by "experts" in the genre.

2. To compare the writing of both native speakers of English (L1) and speakers of English as a second language (L2) in this genre with model texts.

3. To observe how mastery of genre interacts with knowledge of subject content in the evaluation of students’ answers to legal problem questions.

4. To gain insights from all the above to better inform pedagogical practice for both L1 and L2 students.
Chapter 2 reviews the literature regarding the analysis of written legal texts and students' difficulties with these, as well as language and study skills assistance for students at tertiary level. Chapter 3 reviews the literature regarding genre and text analysis and outlines the methodology and approach of this study. Chapter 4 presents the first of three detailed analyses of "model" answers to legal problem questions, all of which were written by course lecturers and thus "experts" in the genre. The text analysed in chapter 4 is a suggested answer to a tutorial problem question while chapter 5 presents two further detailed analyses of suggested answer texts to legal problem questions (an examination question and an assignment question) written by two other lecturers from the CL65 course. In chapter 5, students' attempts at writing answers to the examination question studied in the previous chapter are analysed and compared with the lecturer's model. The final chapter summarises the principal findings of the study and the pedagogical and research implications.
CHAPTER 2

LITERATURE REVIEW

2.1 The analysis of legal text

Mellinkoff (1963) in his classic study *The Language of the Law* criticizes the law's "wordiness, lack of clarity, pomposity and dullness". He describes in detail the characteristics of legal language: the use of archaic words and phrases from Old and Middle English, French and Latin, the use of formal or ceremonial words and constructions in both written and spoken legal contexts, and the use of both precise technical legal terms and deliberately vague words and phrases. Quirk et al. (1972) also identify a class of complex prepositions such as *in respect of, in accordance with*, etc., as being much more common in legal English than in other varieties of English. Crystal (1987: 386) notes in his discussion of legal language that:

There is no other variety where the users place such store on the nuances of meaning conveyed by language, where unstated intentions are so disregarded, and where the history of previous usage counts for so much.

Crystal and Davy (1969: 194) in their discussion of the language of legal documents also comment that:

... the complexities of legal English are so unlike normal discourse that they are not easily generated, even by experts. It is a form of language which is about as far removed as possible from informal spontaneous conversation.

It is no doubt this distinctiveness that is the reason for the now quite considerable body of literature investigating legal discourse, both spoken and written in a variety of settings such as the courtroom, legal interviews, the legislature and in academic contexts. Bhatia (1982a, 1987), Danet (1990) and Maley (in press) all provide comprehensive and useful overviews of the language of the law in its many facets. Maley (in press) divides legal discourse into four sets of related discourses: judicial discourse (from which case law is derived), courtroom discourse (interactive language), the language of legal documents (including legislation), and the discourse of legal consultation (lawyer / lawyer and lawyer / client). The area that is overlooked in Maley's survey is legal language in academic and pedagogical contexts and linguistic investigation in this area is decidedly scanty. Bhatia (1987: 227) does, however, include some academic and pedagogical legal discourses or genres in his mapping of the legal domain (see *Figure 2.1* below) making his primary distinction between written and spoken legal language and then
according to the settings or contexts in which it is used (namely, pedagogical, academic, professional, juridical, or legislative).

The focus of this study, the legal problem genre, does not appear in Bhatia's original diagram however, but is a member of a class of written pedagogical genres which also includes case note answers and legal essays (all added in italics to the diagram)¹.

Figure 2.1: The Language of the Law

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The linguistic investigation of these areas clearly remains as a largely unexplored area. Much more work, however, has been done on analysing the written language of the law in legislative and juridical settings, areas which of course have considerable relevance to the reading requirements of students studying law. The following discussion, then, concentrates almost entirely on the literature concerning written legal texts (legislative, juridical, academic, and pedagogical) although some studies that investigate spoken language will also be briefly touched upon, where relevant.

¹The written professional genre which includes office memoranda, appellate briefs and other written lawyer-lawyer professional opinions is also omitted from the original diagram (added in italics in Figure 2.1). These professional genres could also appear in the pedagogical category because they are also set as assignments in law schools (Nafziger, 1980).
Legislative texts

Formal

Yon Maley (1987) in her analysis of Australian and British legislation relates the characteristics of legislative language to its role in the institution of the law. She examines the interplay of history, social function, participant roles, accepted legislative goals, and language use in order to show that it “is a motivated, use-based style or register (Halliday, 1978: 32) of English” (p. 26). Analysis of these factors reveals the inherent oppositions or apparent contradictory considerations that co-exist in the language of statutes. The competing considerations are, according to Maley, to provide for flexibility on the one hand and for certainty and stability on the other. For example, a central role of legislation is to create rights and obligations that are either mandatory or discretionary. Modal verbs such as shall, must, and may play an important part in this regard but as Maley comments they “are notorious sources of ambiguity in legislative interpretation” (p. 30). Other oppositions that operate include generality and specificity, precision and vagueness, and explicitness and condensation.

The legislative goal that is apparently prized above all others is the achievement of certainty. Maley quotes Wade (1940) who maintains, somewhat astoundingly, that in general terms “it is more important for a rule of law to be certain than it is for it to be just” (Maley, 1987: 35). The pursuit of certainty has led to explicitness which is revealed in long detailed lists of entities and actions in an attempt to cover every possible situation or eventuality, and the use of repetition as a cohesive device and the avoidance of pronominal reference because of potential ambiguity. A further outcome of the desire for certainty is the attempt at precision which is primarily achieved by the use of specialised technical lexis.

Balanced against certainty, however, is the need for the law to have flexibility so it can achieve “the comprehensiveness sought by generality and provide leeways ... for unforeseen circumstances or entities which may later be included in the ambit of the rule” (ibid: 38). This is demonstrated by the use of general classifying words such as vehicle, thing, and place which are said to “have a core of uncertainty and a penumbra of doubt which give legal language its characteristic open texture” (ibid: 38), and the use of vague or subjective words such as reasonable, wilfully, and undue. Based on an historical preference for single sentence sections or sub-sections, legislation necessarily frequently contains a degree of condensation “in order to fit all the elements of the rule within the confines of one sentence” (ibid: 39). This is principally achieved by
condensing clauses into participial phrases and phrases into nominalisations, the use of which Maley points out is paradoxically often wordier.

Gustafsson (1984) in a study of British and American legislation identifies binomials, i.e. sequences of two words belonging to the same word class and syntactically co-ordinated and semantically related, such as by and with and advice and consent, as being a distinct style marker of legal English being 4-5 times more common than in other prose texts. She points out that binomials typically function adverbially towards the end of sentences and mostly serve the purpose of technical accuracy to achieve precision and avoid ambiguity, but in some cases they do appear to be redundant and a relic of the linguistic history of the English language.

Bhatia (1982c, 1983a, 1984, 1987, 1993, in press) has also written extensively on the language of legislation in the British tradition and his writings corroborate the findings of the previously mentioned authors. He has comprehensively explored the area of the formal and functional characteristics of qualifications in legislative writing and the applications of this to the pedagogical situation. Bhatia maintains that qualifications play a central role in the rhetorical structuring of legislation and “form the basis of the underlying cognitive structuring ... without which it [the legislative provision] will be nothing more than a mere skeleton of very little legal significance” (Bhatia, 1983a: 26). Qualifications, especially prepositional phrases and subordinate clauses, are very syntactically mobile and thus are an important part of the draftsman’s repertoire being inserted “at various syntactic positions to achieve, on the one hand, clarity, unambiguity and precision and on the other hand, all-inclusiveness” (ibid: 26). Bhatia also draws attention to the tendency of legislative writers to nominalise, to use complex prepositions and binomial and multinomial expressions, and syntactic discontinuities to achieve these aims. The result is that legislative texts are frequently extremely long and syntactically complex and consequently, very difficult to read. Swales and Bhatia (1983: 100) comment that:

> the draftsmen's search for sentences that are self-contained and thus open to free-standing and independent interpretation produces a loose sentence structure with the attachment of many discontinuous qualifications, cross-references and provisions. The general means whereby these results are obtained are the fullest use of nominalizing devices (especially in the articulation of sequences or prepositional phrases) and the insertion of adverbial segments of a length and with a frequency rarely found in other types of written English.

**Frozen**

Danet (1985) in her discussion of legal documents similarly elaborates a number of distinctive lexical, syntactic, prosodic, and discourse-level features through the analysis of a British legal “Assignment” document. Lexical features cited include technical terms...
(or "terms of art" in legal parlance) such as real property and fee simple; common terms with uncommon meanings in a legal context such as assignment and beneficial; archaic expressions such as hereinafter and wheresoever; doublets such as cease and desist, and will and bequeath; the preference for shall over will, and the use of the present emphatic e.g. do(es) hereby convey; unusual prepositional phrases such as as to; and the high frequency of the word any. Syntactic features noted include the prominence of nominalisations such as make such provision for the payment instead of provide for the payment; the prominence of passive constructions such as it is hereby declared; the frequency of whiz deletion (i.e. the omission of a wh-word and the verb to be) e.g. agreement ... herein (which is) contained or implied; the frequent use of complex conditionals; the high incidence of strings of prepositional phrases; the unusual length and complexity of many sentences with frequent clausal embedding; the use of said and such as determiners e.g. The Creditors have agreed to accept such proposal; the preference for the third person; the frequency of negatives especially multiple negatives; the prominence of binomials and parallel structures.

Danet also explores "possibly distinctive prosodic features of the legal register" such as the occurrence of poetic features "mainly in binomial expressions and in the critically performative parts of documents". She describes evidence of assonance, alliteration, phonemic contrast, rhyme, rhythm, metre, and end weight (i.e. where "there are more beats, or more phonetic material, in the second half of a two-part expression"). Discourse-level features, such as cohesion and thematic progression, were also explored by Danet. Her analysis revealed that pronominal reference appears to be eschewed as a cohesive device "presumably to avoid ambiguity" and that there is consequently much lexical repetition and also, relatively little use of synonymy between sentences. She also comments on the extreme propositional density of these types of texts:

The maze of embedded clauses and prepositional phrases in the Assignment makes this evident. Propositional density, in turn, entails a striking lack of redundancy in information communicated-every word counts. (p. 286)

Kurzon (1984) studied the thematic progression of five British legal texts: a will, a deed, a contract, a court order, and a statute. His study reveals that these texts have an identifiable thematic structure which predominantly "involves the hypertheme of the particular text, which is derived from two sources: the set of expectations produced by the specific genre of text, and the title of the text, if there is one".

Comprehension problems are not confined to written legal language, however. Charrow et al. (1982) in a study of the comprehensibility of standard jury instructions in US. courtrooms discuss a number of grammatical and discourse features, similar to
those noted above for legal documents, that create comprehension problems for jurors, including truncated passives, misplaced phrases, nominalisations, prepositional phrases such as as to, repetition in discourse, subordinate clause embeddings, and multiple negatives.

There are thus specific psycholinguistic problems in the processing and understanding of legislative texts which place excessive strain on short term memory (Bhatia, 1982c). Bhatia (1982b, 1983b, 1989, 1993) argues against trying to “simplify” legal texts in English for Academic or Legal Purposes (EALP) courses and advocates instead the laying out of real statutes in what he calls “easified” versions which make readily apparent the main provisions of the statute, its qualifications and the functions that the qualifications perform. In this “easified” version, the wording of the legal text is unaltered but is much more accessible to readers because of the way it is laid out.

**Juridical texts**

**Judgments**

Christopher Enright (1987: 164), in his study handbook for Australian law students, claims that while legal judgments have “no standard format”, they do however have “a fairly discernible pattern”:

Normally a judgment will commence with a statement of the facts. Where a number of judges hear a case, frequently only the first judge will summarise the facts and the other judges will refer to his statement. Similarly where there are a number of judges it is not uncommon to find only one or some of the judges giving elaborate judgments. If other judges agree with a judgment, they may indicate their concurrence with one of the other judgments, and perhaps add some brief comments. After the facts there will normally be a statement of the issues before the court. This is obviously a very valuable piece of information as it is the judge’s indication of what the case is about. After the issue comes the reasoning, the conclusion, and the order or finding. Thus a judgment has a number of sub-parts – facts, issues, reasons, conclusions and order or finding.

Maley (1985) uses Enright’s outline above as a starting point in her analysis of legal judgments from a systemic - functional perspective drawing on the work of Halliday (1978) on context of situation and the work of Hasan (1978) on generic structure in order to delineate the structure and characteristics of the legal judgment genre. She analyses the judgment in a case brought on appeal to the Australian High Court and writes that the role of the judge is as “an umpire in an adversarial system, where at least two points of view or possible arguments are submitted as contenders for the ‘correct’ decision” and therefore the legal judgment itself:

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1Bhatia (1983a: 18), who used a specialist informant as an integral part of his research on legislation, writes that “the role of the specialist informant may not necessarily be confined to the validation of analytical findings alone, it could also significantly contribute to the formation and modification of hypotheses”. 

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... is essentially an exercise in problem solving. The problem must be solved and a decision made no matter how complex and difficult the interrelationships of facts and principles (ibid: 161).

Maley concludes that the judge has two main legal functions: a declarative (declaring "what in his opinion is the correct applicable law") and a justificatory ("in externalising his reasoning, he justifies his decision") function (ibid: 161). Based on her analysis of this case using the structural elements outlined by Enright above, Maley proposes the following generic formula to show the "typical constraints and patterns of mobility for the legal judgment":

\[
C \cdot O \cdot [(F^A)(I^R)^N]
\]

where (after Hasan, 1978):
- \(F^A\) = complete freedom
- \(I^R\) = mobility
- \(O\) = optional elements
- \(A\) = fixed order
- \(N\) = recursivity
- \(\{\}\) = scope of recursivity
- \([\}\) = scope of mobility

Her analysis also "confirmed the prediction that institutional factors, the register of judicial discourse and its structural elements are linked" (pp. 168-9). The conclusion, \(C\), and the order, \(O\), realise the declaratory function of the discourse declaring the principle of law relevant to the case as well as the decision binding on the litigants. These are chiefly manifested in the former case through non-specific determiners and general nouns, such as in a member of the armed forces, and by modal expressions of obligation and necessity\(^1\) while the order is also characterised by similar modality but with definite processes and participants, such as in the answer, the plaintiff should. The justificatory function, on the other hand, is realised through the issue, \(I\), and reasoning, \(R\), sections of the discourse. These, according to Maley (ibid: 169), are chiefly signalled in the former case "by traditional register collocations and by fairly explicitly expressed meanings (it is contended, the issue is ...)" while the reasoning sections are far more varied and complex but are characterised by conjunctives or other expressions that realise "logical reasoning and analogy", such as if ...then, it follows, and also by modal expressions of probability\(^2\).

\(^1\)Deontic modality (Palmer, 1979) or in Halliday's terms modulation (Halliday, 1985a)

\(^2\)Epistemic modality (Palmer, 1979) or in Halliday's terms modalization (Halliday, 1985a)
Maley’s analysis also highlights the essentially individualistic nature or tenor of this type of discourse where each judge declares the law as he or she sees it, which is “a cultivated, valued feature of common law legal systems” (p. 169) in contradistinction to European systems which deliver “more stereotyped judgments” (p. 162). Modality, both epistemic and deontic, is the chief linguistic realisation of this tenor throughout the discourse and Maley concludes that:

The interaction of modality and modulation reflects at the linguistic level the interplay of the central dimensions of the judicial role; on the one hand individualism and on the other the discharge of the declaratory and justificatory functions of judgment (p. 169).

In a later paper, Maley (1989) further explores the role of interpersonal meanings in judicial discourse analysing three cases that were brought on appeal before the House of Lords in the U.K. (and thus, a total of seven judgments). She basically confirms the findings of her earlier study and points to the fundamental individualistic nature of legal judgments in the British common law. Legal judgments are carefully written texts which are “conceived as 'speeches’ delivered serially by a group of ‘noble and learned friends’” and later published in Law Reports and incorporate a range of linguistic features such as direct address, vocatives, honorifics, first person, the use of which “sustains the convention that judicial discourse is interactive spoken discourse” (p. 73). She stresses the importance of the first person point of view as “an explicit manifestation of the judge’s constitutional role” (ibid).

As judgments are not a mere reporting or recounting of facts but an evaluation of them in order to assign rights and duties, the legal judgment necessarily involves many expressions of modality, chiefly (in Halliday’s terms) modalizations of probability and modulations of obligation. The reasoning (R), order (O), and conclusion (C) sections of a judgment contain most of the modalities which are not very common in the facts (F) section. Overall, Maley found that there were considerably more modalizations than modulations and expressions of modulation were typically prefaced by modalization. She comments that:

judgments contain overall, more individual expressions of opinion, more inferential possibility and necessity, more conditionality than they do the laying of obligations and the granting of permission. This in itself is surprising to those who think of the law as essentially certain, impersonal, authoritative (p. 82).

Maley concludes that “the process of lawmaking or lawgiving is legitimated within legal discourse primarily by interpersonal meanings” (p. 83) and that the authority and legitimacy of the law heavily depends on a “manifest rationality, the giving of reasons” (p. 84) as embodied in the ordering and linking of the structural elements of this genre. She summarises the form of the judgment in the following way:
In these circumstances the relevant principles are X and for the reasons given I think X should be done (p. 84).

Finally, the leading role that modality plays in this discourse is related to the institutional requirements of the discourse; namely, the need for the judges to express their individual or personal opinions and to "resolve uncertainty, declare rules and order conduct" within a distinctive genre which has social legitimacy (ibid).

Korner (1992) demonstrated that in solicitor-client interviews, modality also plays a very significant role. In the spoken professional genre of the legal interview, the choices of modality reflect the dominance/deference relationship of the parties with respect to the matters under discussion. Korner found that the solicitors used high value modulations when advising the clients of their legal obligations and the actions they should take but low value modalities when speculating on the outcomes of their disputes involving higher authorities such as the courts or government departments. Not surprisingly, clients (as the deferential party) demonstrated a quite restricted range of modality choices in the interviews. Korner (1992: 53) summarises her findings as follows:

the modality choices that speakers make in legal interviews reflect the dominance/deference relationship between solicitor and client in that the solicitor uses high value obligation when negotiation (sic) actions to be undertaken by the client. In addition they reflect dominance/deference relationships between solicitor and magistrate or judge in the hierarchy of the legal system and dominance/deference relationship between client and authorities such as employer, landlord, government departments and finance company, even though these are not participants in the interview.

Cases

Bhatia (1993) has also investigated legal cases as a genre in the language of the law. His work essentially follows the approach of Swales (1990) to genre analysis which will be discussed in the next chapter. Bhatia points out that legal cases are "abridged versions" of the long and detailed legal judgments printed in law reports and "form the most significant part of a law specialist's reading list whether he is a law student or a practising lawyer" and are "essential tools used in the law classroom to train students in the skills of legal reasoning, argumentation and decision-making" (p. 118-9).

According to Bhatia, legal cases play an important role "in the negotiation of justice as well as in legal education" and serve four main communicative purposes: as authentic records of past cases, as a body of precedents (i.e. the ratio decidendi or principles of law that form the basis or reason for the decision) for later similar cases, as "reminders to legal experts", and "as illustrations of certain points of law" (p. 119-120). The first purpose is realised in the law reports previously mentioned and analysed in detail by
Maley (1985, 1989) and discussed above. The other functions are served by various
different kinds of case books which cover the following important aspects: the material
facts, the verdict, and the *ratio decidendi* of the case.

Bhatia proposes a four move structure for legal cases with the first move “Identifying
the case” being the formulaically expressed title of the case. This feature was not
covered by Maley (above) in her analysis of legal judgments. The second move he
labels “Establishing the facts of the case” which essentially corresponds to Maley’s
relevant facts (F) generic unit, except that what appears in the casebook is a summary of
the relevant facts according to the casebook writer rather than the outlining of the facts
by the judge in the legal judgment. Bhatia’s third move is called “Arguing the case” and
contains three major sub-moves: (a) giving the history of the case, (b) presenting
arguments, and (c) deriving *ratio decidendi*. This move corresponds to Maley’s
reasoning (R) and conclusion (C) generic units in the full legal judgment, but what
appears in casebooks is an abridged version of the judge’s actual reasoning and
conclusion with strategic excerpts only being reproduced. The final move in Bhatia’s
analysis is “pronouncing judgment” which corresponds to Maley’s order (O) unit and is
“generally signalled by the term, ‘Held’, ... very brief, formulaic, highly standardized in
character and inextricably part of the case” (p. 135) but may be more elaborate and also
may contain the actual words of the order of the judge.

It is interesting that in his earlier mapping of the legal domain, Bhatia (1987) classifies
judgments and cases as separate genres (see Figure 2.1 above), whereas in his most
recent writings he appears to subsume legal judgments “as authentic records of past
judgments” (Bhatia, 1993: 119) under the genre of legal cases. Because legal judgments
are clearly primary sources and texts and the summaries or abridged versions of them in
casebooks are secondary sources which contain excerpts from the original judgments as
well as precis or summaries of other details, it is contended that the legal judgment
deserves distinct genre status by itself while the various casebooks are a sub-genre (or
arguably, a separate genre serving pedagogical and professional purposes) derived from
the legal judgment.

**Academic and Pedagogical texts**

While the most extensively studied area of legal language has undoubtedly been
legislation and legal documents (Bhatia, 1987), there has been comparatively little work
done in the area of academic and pedagogical legal discourse. Bhatia (1987: 227), in his
state of the art article on the language of the law, appears to classify textbooks in his
diagram as a written academic genre (see Figure 2.1 above) while in the text of the
article itself, he classifies them as pedagogic texts (p. 229) although this category does not appear in the diagram published. Although these texts are written in an academic context, their purposes are clearly pedagogical and their readership largely a student rather than an academic one. They are, however, written by legal experts and so are different from the written pedagogical texts included in *Figure 2.1* (above) which are primarily (apart from example or "model" texts written by lecturers in handbooks etc.) student-generated texts. As Bhatia (1987) notes, there appears to have been almost no research published regarding the academic genre of the journal article in law and this genre is not included in the discussion below.

**Textbooks**

Bhatia (1987) in his discussion of law textbooks draws on Swales's (1981) work to suggest that because of "the special methodological and conceptual features of law", law textbooks may realise a common communicative act such as defining in different discoursal ways from texts in other disciplines such as science. Swales's study thus has implications for ESP course design because some published course materials in the ESP field (the Nucleus series, for example) have been organized around "standardized sets of concepts or notions" such as defining, classifying, relating cause and effect, describing properties, and indicating probability.

Swales (1982) has also studied the role of case references in English for academic legal purposes. He identifies three different ways (parenthetical, locative, and "marked") that cases were cited in legal textbooks and the discourse functions they perform. As the legal texts move from description to discussion, there is also a steady increase in the number of cases referred to. In this study, he attempts to show that "a specific genre such as 'case-rich' legal discussion has specific patterns of organization which are expounded by lexical and syntactic features peculiar to it" (ibid, p.140). Furthermore, an investigation of non-native English students' use of cases in answering examination questions demonstrated a high correlation between the number of cases cited and the grade the student achieved illustrating the importance "for students to set out their authorities by including references to the principal relevant cases" (p.146).

Wickrama's (1982a: 52) study of the linguistic features of a commercial law textbook demonstrates that the language used and its rhetorical structuring within a particular textbook "largely depends on the source of law - Common law or legislative enactments".

In a more recent study, Hare (1993) conducted a corpus-based analysis of the lexis in extracts from ten undergraduate law textbooks (63,000 word corpus in total). His study showed somewhat surprisingly that specifically legal lexis does not occur frequently.
The texts have "a core vocabulary" of a relatively small number of words (i.e. 74 words comprise 49% of the corpus and each occurs more than 100 times out of a total vocabulary of 6300 words) including the conjunctions but, if, so; the modals may, would, will, must, can, should; and the determiners any, and such. There are, however, a very large number of "sub-technical" legal words such as action which constitute a large proportion of the text and may have a range of meanings from "general" to more technical. Non-native speakers may know the general meaning but be quite unaware of the other specialised or technical meanings. Hare recommends the use of authentic materials in EALP courses and exposure "to the wide range of vocabulary that they are likely to encounter" and further that "the problems that students have do not stem entirely from the lexis used in EALP studies, but may also originate in difficulties with the generic structure of the text".

**Essays**

Although there is no shortage of books and articles about tertiary essay writing in the educational literature (e.g. Clanchy and Ballard, 1981; Nightingale, 1988; Biggs, 1988), there appears to have been very little research so far conducted into the linguistic features of law essays. Harris (1992: 26-7) points out that "law students are socialised into an importantly oral culture" with lectures, seminars, and moots providing "extended opportunities for acquiring the 'cant' (Phillips, 1982)" while far less attention is paid to academic legal writing which is clearly "a neglected area". Harris speculates that the assumptions underlying this appear to be:

first that good legal writing is nothing more than good writing, and second, that good writing is a manner (sic) of grammar and works with syntactic units (p. 26).

There is, however, some concern among lawyers at the literacy standards of many law students and a number of articles have appeared in recent journals about legal writing (e.g. Stratman, 1990; Murumba, 1991) and the need for explicit teaching of law students (e.g. Hasche, 1992). There is also the advice contained in student handbooks written by law specialists such as Enright (1987), Krever (1989), and Bradney et al. (1986), and now more recent material written by language and study skills staff (e.g. Crosling and Murphy, 1994) for students studying law.

Based on the advice given to students in the above handbooks on analysing essay questions, the need for critical analysis rather than mere summary, and the need to plan and structure essay answers around an introduction, body and conclusion, it would seem that legal essays as opposed to other legal writing genres such as cases notes and legal problems (discussed below) are not generically different from essays in other
disciplines, except for the type of footnoting employed in referencing and case citation conventions and the use of legal lexis. For example, Gaskell (1989: 85) comments:

There is a distinct difference in the technique required to answer an essay type question as opposed to a problem. Too often, so much attention is given to the “new” technique of answering problems that students forget how to deal with essays. The essay often gives much greater scope for critical analysis, i.e., going beyond a mere description of what the law “is” to what it “ought” to be.

The only linguistic study of law essays this author has located (reported in Freedman, 1993: 228) maintains, however, that “law essays could be differentiated clearly from other academic essays as a distinctive subgenre of academic writing”. Freedman describes a case study of 6 students in the process of writing first year undergraduate law essays. Students’ notes and drafts of all their law essays were analysed as well as all other essays in these students’ other subjects over one academic year. Freedman found that the law essays were distinct on syntactic and lexical grounds: “there were more words and more clauses per t-unit, and fewer t-units per sentence” (ibid) and the essays used various types of specialised and general legal lexis. In terms of discourse structure, they displayed “distinctive rhetorical features at the micro and macro levels” including “a contrapuntal or dialectal form ... and a highly formalized and distinctive pattern at the level of the conceptual paragraph” and compared with the students’ other essays, the law essays “evinced a very distinct mode of argumentation” (ibid).

Freedman concludes that these students were learning to write like legal scholars and thinkers as “members of a new knowledge community” which was the pedagogical purpose of these writing tasks and further:

Through their writing, the students came to know and construe reality in specified ways, ways that were different from the ways in which they construed reality in other disciplines or in their everyday lives. In the course of (and as a result of) their writing, the students focussed on and categorized specific phenomena (as constrained by the terms of the assignment, the subject matter of the course, and the distinctive lexicon employed), identified hierarchic relations among propositions (as evidenced by the syntax), consistently took a dialectical stance towards each issue, and enacted certain modes of reasoning which privileged some warrants, not others. (pp. 228-9)

This is certainly an area of study that deserves further investigation.

Case Notes

Iedema (1993) has conducted the only linguistic investigation known to this author of the case note assignment. He uses a systemic-functional approach to examine two student case note assignments: one written by a native speaker (NS) who scored a high mark (13.5 out of 15) with comments such as ‘promising’ and another by a non-native speaker (NNS) who scored a very poor grade (3 out of 15) with comments such as
‘clumsy’ and ‘well below standard’. Iedema maintains that the NNS student’s problems are not so much with the content but “mainly concern the discourse specific conventions and textual strategies” (p. 88). Indeed, the lecturer’s notes to students in the course contained the following advice about legal writing:

The way you write is important. This includes the style in which you address the issues, but perhaps more importantly, the structure you use to organise your ideas (ibid: 107).

The lecturer also pointed out that case notes routinely occur in “most of the leading journals” and students were advised “to read some others to get a feel for the genre” (ibid, p. 122). In their case notes, students were instructed to

include all relevant matters such as the procedural history; a brief statement of the facts giving rise to the dispute; the issues before the court; the particular court and its place in the judicial hierarchy; the arguments put by both parties; the reasoning used by the court to reach its decision and the ratio, if appropriate as well as noting any significant obiter dicta. Relate the case you have read and noted to any relevant issues covered thus far in the course (ibid: 122).

It is interesting to note that although case notes are considered to be a separate legal genre that is an established part of law education, there is no specific coverage of them in any of the law study handbooks mentioned above in the previous section.

Iedema’s paper adopts the lecturer’s instructions quoted above as the appropriate generic staging for case notes, although he has not followed the lecturer’s advice and “read some others” (i.e. those written by experts in the genre and published in journals) in order to “get a feel for the genre” and delineate with more certainty its archetypical staging. The NS student constructed her work around the instructions provided using them verbatim as headings although the lecturer criticised this as “stilted” and advised her to “read a few case notes” (p. 91). The NNS student, on the other hand, while attempting to follow the instructions as set out by the lecturer has “less explicit” staging with some of the stages omitted and an introduction and a conclusion added. Iedema concludes that “this deviation from the generic norm and the failure to include essential stages may have contributed to the lecturer’s comment ‘clumsy presentation’” (p. 94).

Although not explicitly explored in Iedema’s paper, the case note would appear to be a closely related genre to the legal judgment itself, i.e. the judgment in the case under discussion. Maley’s analysis (1985) proposed five generic stages: F, relevant facts; I, issues to be resolved; R, reasoning; C, conclusion or ratio decidendi; and O, the order or finding. The lecturer’s instructions above are largely comprised of these stages along with the procedural history of the case and the jurisdiction of the courts concerned, as well as the wider legal significance of the particular case.
Iedema's systemic analysis of the lexico-grammatical and discourse semantic features of the two student texts reveals some interesting differences between them. Differences reside in the students' use of conjunction, modality, nominalisation, reference and thematic progression. Iedema identifies the use of incongruent realisations of logical relations (e.g. the use of the verb follows instead of the congruent form because to signal causal logical relations) as well as implicit conjunctive links in the NS text and in a legal judgment previously analysed (Iedema, 1991) as important features of legal discourse which enhance "the non-negotiability" of the conclusions reached (Iedema, 1993: 100). The NNS student, on the other hand, uses explicit temporal conjunctions "that are not appropriate to a summary of reasoning" (ibid: 108). Iedema contrasts the expression of opinion via the system of modality in the two texts and shows that the NNS student employs high value modalizations such as: will and always in making broad generalisations but fails to provide any references to support these statements. The NS student, on the other hand, is much more guarded about expressing personal opinion preferring to summarise the views of the judges rather than advancing her own. Iedema concludes that the NNS student's difficulties involve "not merely 'problems with English' ... [but] how to sensitise herself to the various generic subtleties and intricacies the target discourse expects her to be in control of" (p. 109).

Legal Problems

As the quotation from Gaskell (1989: 85) in the discussion above on essays indicates, the answering of legal problems is a 'new' technique that students have to acquire which is quite different from essay-writing and consequently demands quite a deal of students' time and attention. Because it is a 'new' technique, law study handbooks invariably contain discussion and advice to students about this new genre which embodies many features that are distinctive to legal study and argument. In legal study, students not only have to adjust to new concepts and language but also to new ways of thinking (Calhoun, 1984) and constructing discourse. Howe (1990: 215) writes that:

When students begin, not only do they have to acquire new lexis, but also new concepts and new ways of thinking. Behind the form and the lexis lies the tradition of the logic of the law - the concepts of issues, points of law, authority, opinion, decision, and so on, arranged in a discourse peculiar to the subject. These concepts and techniques of arguments are different from other subjects in the social sciences and have to be learnt.

The legal problem is a simulation task where "the student has to imagine himself a lawyer, giving advice to a client" (ibid: 216) and has been described as follows:

By a problem or problem question is meant a question or exercise where a student is asked to discuss the legal consequences of a set of facts. Normally these consequences are expressed in terms of the availability of some remedy. Further, it is a common practice to construct a problem so that the legal consequences of the facts are not immediately clear. ... The areas where
the legal consequences of the facts are not clear constitute "the issues", and are the very essence of the problem question. (Enright, 1987: 341)

This simulation task is a learning tool that enables students to practise and develop the art of legal argument as well as an important means of assessment in law and is used to determine not only student understanding of important legal concepts and principles, but also how these apply in practice in everyday situations. Although its purposes are clearly pedagogical, the student's task is not dissimilar to that confronted by the judge when the case comes to court to sift through the facts that have legal significance and identify the issues of law, to apply legal reasoning which involves examining analogous previously decided cases and the principles that were established in these and then to apply these to the facts of the case under consideration, and to weigh up competing interpretations or arguments in order to reach a conclusion. The answering of legal problem questions has, therefore, a fairly predictable structure which is also relatable to the discourse patterns and thinking processes of legal judgments.

The advice given in student handbooks reflects this. For example, Gaskell (1989: 79) recommends that in answering legal problems:

The form in which you should write is that adopted by the textbook writers. You should state a proposition of law; you should give the authority for that proposition; and you should then apply that proposition. ...A fuller way of presenting the argument would be (1) Problem/issue; (2) Proposition; (3) Authority; (4) Application.

The central role of legal authority is emphasised by Farrar (1977: 48) in his discussion of legal rhetoric, where he writes that:

The principal rhetorical device used in law is the appeal to authority. ...In order to reason like an English lawyer then one has to know the sources of authority, the content of the particular authority and the set of ground rules for using authorities.

Krever (1989: 52) stresses the need for students to remember "the dialectic nature of law and canvass all the arguments and counter-arguments raised by a problem", and not to avoid making a conclusion:

It is not enough to recognise and articulate the legal arguments relevant to a case. The second element of legal reasoning is to recognise the relative strengths and weaknesses of the opposing arguments and suggest a likely outcome of a conflict. You are not evaluated on the basis of a 'right' answer, but rather, whatever your conclusion, you will receive marks for showing you know how to make decisions and suggest resolutions of a dispute through a reasoned evaluation of the merits of the arguments you discuss.

In their recently published handbook on studying business law, Crosling and Murphy (1994: 127-8) propose the following tentative "model or formula" for answering legal problem questions which they also stress "is not a rigid formula that must be applied exactly in this format ...there is room for flexibility": (i) stating the known; (ii) raising
the issue; (iii) citing a case; (iv) stating the rules, principles or statutes; (v) stating the facts and analysing them in terms of (ii) and (iv); (vi) coming to an opinion; and, (vii) if appropriate, stating a remedy.

Pat Howe (1990), another EAP/ESP professional, has undertaken the only significant linguistic analysis of the problem question genre published to date that is known to this author. She examined twenty scripts, 10 written by law lecturers (and thus experts in the genre) and 10 by novice law students (including six non-native English speakers), all of whom had received high marks for their work. The legal problem answers analysed covered four areas of law: criminal, public, contract, torts. Howe used Maley's (1985) analysis of the legal judgment genre as her starting point (as well as the work of Hoey, 1983, and others on macro discourse structures) but found that the legal problem genre, whilst relatable to the legal judgment, contained a number of different distinct units. She proposes the following eight "units of discourse" or schema for this genre:

1. the situation,
2. the instruction,
3. the forecast or overview,
4. the issue(s),
5. the relevant law,
6. its authority,
7. the application of the facts,
8. opinion (and advice).

The first two units pertain to the problem question itself (the facts of the problem and the instruction to the students) while the other six to the answer. The first unit corresponds to Maley’s “Facts” and Hoey’s “Situation”. Maley argues that these two units are part of the discourse because the problem answer contains exophoric reference to the facts in the question. Not all the units proposed were found, however, in all the scripts. Some of the units such as the forecast would appear to be optional but the law, its authority and the application of the law to the facts form a central nucleus that could be repeated depending on the issues of the problem. This nucleus of three units

1Hoey (1983) and Jordan (1980) write of a common macro discourse structure, the Problem / Solution pattern, that underlies many texts in English. It is usually comprised of the following units: Situation, Problem, Response, Result, Evaluation.
2Maley discusses Pound’s four categories of legal statement: the rule, the principle, the standard, and the concept and finds evidence of all types in the scripts examined. The last category “the concept” corresponds to definitions and Maley comments that definitions appear to be less common in this form of discourse than “in other first year undergraduate papers or... in law essays” (p. 226).
corresponds to the single unit of Maley entitled "Reasoning". Howe agrees with the comments of Enright (above) about the essential nature of identifying the issue because "it displays an ability to perceive what the problem is, what the courts will have to decide" (ibid: 223). This unit corresponds to Hoey's "Problem" and Maley's "Issue or Question before the court". The issue, however, is not always stated and "may sometimes be assumed" (p. 224) in situations, for example, when the law is clear.

As well as mapping out the schematic structure of this genre, Howe identifies many lexicogrammatical and discourse features that characterise the various stages of the schema. For example, the issue is usually expressed as an indirect question (most commonly with whether), the law is usually expressed in the simple present tense (unless it has been repealed or changed), while the authority is usually in the past tense. The application section contains exophoric reference to the problem facts, "reasoning" which often includes a condition or explanation, and logical connectives which complete a syllogistic pattern\(^1\) such that "the law (and authority) constitute the main premiss, the facts are the subordinate premiss, and the argument is led into the opinion or conclusion by a connective such as therefore" (ibid: 230). The opinion is usually "equivocal" employing hedges (ie expressions of modality).

There would appear to be differences in the use of case or statute authority between expert and novice writers in this genre. Howe examined the students' and the lecturers' references to authority using the work of Swales (1982) in which he classifies case authorities into "parenthetical", "locative", and "marked". She describes the first type of reference as "the professional style, one lawyer to another", the second as typical of the "pedagogical arena and the student's need to display his knowledge" and thus common in both law essays and textbooks, and the third where detailed descriptions are given of a case as occurring "because it is particularly analogous to the facts of the problem set" (Howe, 1990: 229). Her study found that students were "more than twice as likely" to detail the facts of a case than law lecturers or professionals in the genre. She speculates that this is due to the fact that as expertise with legal concepts and abstract principles of law develops, then so there is less need to ground these in concrete examples or "stories": "the greater the expertise, the more is assumed" (p. 230).

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\(^1\)Farrar (1977: 49) gives the example of the following syllogism: All men are mortal (Major premise); Socrates is a man. (Minor premise); Therefore, Socrates is mortal. (Conclusion). He cautions, however, that this kind of formal deductive logic only really applies "in the case of clearly expressed statutory rules or well established case law rules and principles" (ibid). This proviso notwithstanding, an introductory law course for non-law students such as Principles of Commercial Law is clearly about giving students a basic grounding in these "well established case law rules and principles" and so deductive logic would be expected to predominate in legal problems in such a course.
2.2 Students’ problems with legal study

Davie (1982) ranked nine types of problems that non-native students experience in the study of legal discourse ranging from inability to see the legal significance of a case down to unfamiliarity with archaisms, formal vocabulary, lexical collocations such as impose a sentence, file a petition etc., and other general vocabulary. He also claimed that second-language students have problems with the discourse structure of legal cases which often follow what he terms ‘forensic argument’ and the typical pattern: “It is said that such-and-such BUT the court thinks otherwise.” These students, likewise, have difficulty identifying the ratio decidendi of cases which Davie maintains is almost invariably in mid-paragraph which “leads to interpretations which are diametrically opposed to what the law actually is” (p.2). Davie also cites the need for non-native students to “spot discourse markers effectively” (ibid).

Spencer (1975/6: 30), in the course of teaching legal English to non-native speakers, identified a substantial set of noun-verb collocations associated with legal texts which “seemed to enter into ‘semantic combinations’ and to be operating as such in the text rather than as individual lexical items” and were thus potentially problematic for non-native speakers. Spencer gives the example of the different combinations of the word judgment in legal discourse, pointing out that “there are severe restrictions on the collocations that judgment can enter into”. While there may be a reasonably large number of possible synonyms for verbs that occur in combination with judgment, the number that do actually occur in legal discourse is surprisingly limited. For example, with the meaning “decide publicly on a legal matter” combinations such as deliver, enter, give, hand down and pronounce a judgment occur but not take, give forth, hand over, grant, announce, alter, etc. a judgment (ibid, p.30). He further speculates that many of these semantic combinations appear to employ an “extended or metaphorical or non-literal meaning” of the verb and that this feature seems to occur far more frequently in law and economics textbooks than in biology and chemistry (ibid, p.31).

However, the problems that students have studying law involve more than purely linguistic considerations. As mentioned previously, one of the major difficulties for all students studying law is adjusting to a completely new subject that requires a new way of thinking, as well as learning the language of the law. As Swales (1982: 140) puts it:

...students have to go through an induction period before they can appreciate whether a judicial decision is relevant, whether a fact is material, or whether a particular case is distinguishable from another one, or before they can develop any fluency in handling the special terminology of the subject, especially in verb-noun combinations like file a petition or impose a sentence ...

1Question 9 of the questionnaire discussed in chapter one was based on Davie’s study.
Katter (1989) highlights the difficulties many overseas students may have in studying law in Australia which arise from cultural variations in methods and styles of learning. Many students come from cultures with differing traditions and perceptions regarding knowledge, education and the learning process. As Ballard and Clanchy (1984) point out, students usually expect some problems with lack of English fluency and accuracy but fail to anticipate "the need to change habits of thinking, studying and learning to suit the demands of the foreign education system" (p.7).

It would appear that students from many Asian educational systems are trained almost exclusively to memorise and imitate rather than to be analytical and question, discuss and develop viewpoints of their own. As pointed out in the previous chapter, the very nature of law "requires the ability to analyse logically, to understand principles and have the ability to apply those principles to any given factual situation" (Katter, 1989: 15). Consequently, many Asian students have to make the difficult transition from being passive rote learners of immutable facts to being independent and interactive learners who can make generalisations, apply general principles to solve problems, and argue different outcomes or alternative interpretations, rather than being solely oriented to learning "the correct answer".

In their survey of Thai, Indonesian and Malaysian students studying in Australia, Bradley and Bradley (1984) point out that culture-specific educational differences such as attitude to teachers, attitude to study material, preservation of "face" and pattern of assessment can all create potential problems. South East Asian students are not used to disagreeing with their teachers and are usually exceedingly deferential.

Often the expectations of Australian lecturers are very different to those of the teaching staff in their home countries. Overseas students often have trouble adjusting to a situation where mere regurgitation of lecture material is unacceptable and thoughtful disagreement is welcomed...Many overseas students believe deference is the most important aspect (Academic, Melbourne University as quoted by McEvedy, 1987).

While all students need to make adjustments in learning approach in the transition from high school to university, overseas students from Asian countries usually experience greater problems than Australians. Table 2.1 (below) illustrates the differing learning styles appropriate at primary and secondary (left-hand column), undergraduate (middle column), and postgraduate levels of education in Australia (Ballard & Clanchy, 1984). Students from most Asian educational systems are trained almost exclusively in the reproductive approach of memorisation and imitation rather than being analytical and "trying to question, discuss and develop viewpoints" of their own.
Table 2.1: Learning styles

<table>
<thead>
<tr>
<th>ATTITUDES TO KNOWLEDGE</th>
<th>conserving</th>
<th>extending</th>
</tr>
</thead>
<tbody>
<tr>
<td>LEARNING APPROACHES</td>
<td>reproductive</td>
<td>analytical</td>
</tr>
<tr>
<td>LEARNING STRATEGIES</td>
<td>memorization</td>
<td>critical thinking and imitation</td>
</tr>
<tr>
<td>Type</td>
<td>summarizing</td>
<td>questioning, judging and recombining ideas and information into an argument</td>
</tr>
<tr>
<td>Activities</td>
<td>describing</td>
<td>identifying and applying formulae and information</td>
</tr>
<tr>
<td>Aim</td>
<td>'correctness'</td>
<td>'simple' originality, reshaping material into a different pattern</td>
</tr>
</tbody>
</table>

(Ballard & Clanchy, 1984: 12)

Bradley & Bradley (1984: 271) suggest that “most Asian students, especially those from Thailand and Indonesia have been conditioned to regard everything printed in a book as the truth; so when one book contradicts another, an unfamiliar and undesirable conflict arises”.

It is not surprising then that these authors also report that S.E. Asian students in Australian tertiary institutions have study skills problems related to lack of experience in lecture note taking, tutorial and laboratory participation, staff-student contact, academic writing and reading. Lack of cultural background knowledge of Australia and the social, political and legal system as well as unfamiliarity with Australian English (particularly Australian accents) can pose additional comprehension problems for many students at first, but these problems are usually conquered fairly rapidly.

Another cultural factor - the preservation of “face”, of not being “humiliated” by being proved wrong or inept in front of one’s teacher or peers (especially with the handicap of a second or foreign language) - results in many students preferring to remain completely silent in tutorials and refusing to venture any opinions. Bradley & Bradley’s (1984) study revealed that 22% of overseas students reportedly never said anything in tutorials.
(although some of these students were "among the more fluent speakers of English" in the study). This poses special problems for such students studying law which, as stated above, has traditionally placed a very high value on oral skills of persuasion and debate.

A further problem involves cultural variation in writing and thinking styles. Students are expected to present their arguments in the English tradition of the strictly linear "logical" development of ideas. Essays are supposed to have an introduction which defines any terms, the scope and focus and the theme or thesis of the essay, as well as an outline of the structure or main points to be covered. The body develops in full the points outlined in the introduction (with a minimum of "irrelevancies") and the essay is rounded off with a conclusion which briefly summarises the main points and theme of the essay. There are clearly differing rhetorical traditions between cultures involving differing perceptions of reader and writer responsibilities, Chinese, Korean and Japanese apparently placing far greater emphasis on the reader's responsibility to interpret the writer's implied message (Hinds, 1987, 1990; Eggington, 1987), as well as different patterns of ordering and structuring information (Kaplan, 1966, 1987).

The Western tradition places great emphasis on comparing, discussing and evaluating alternative arguments, students being expected "to express and justify a viewpoint, rather than stringing together a series of presumably authoritative quotes or semi-quotes from text books" (Braley & Bradley, 1984: 283). In the words of an academic from Melbourne University:

... one of the most important qualities needed by a student to succeed is an ability to think logically and to develop a theme in a logical way with provision of appropriate 'continuity'. A student fluent in English but who lacks the insight and ability to do this could well struggle to obtain a degree so that I must rate fluency in English as less important than having a logical mind and the ability to appraise critically what is read or taught. Of course, if English expression is too poor to permit the student to state sufficiently clearly what he/she means, or to get down on paper sufficient information within a given time, chances of success in study are also poor. (McEvedy, 1987)

Critical analysis is the expectation, but is exceedingly difficult for students who have exclusively practised rote-learning and memorisation, never questioning the teacher or the text. Indeed as Bradley and Bradley (1984: 289) point out:

The South East Asian student is accustomed to being told explicitly what to read, and is expected to read that carefully, almost word by word and perhaps even memorize the essential sections which the teacher may identify for him or her ... In many cases each subject in school or even at University would have only one text.

It is not surprising, then, that many Asian students often have little understanding of the conventions and seriousness of referencing and plagiarism and difficulty in adjusting to new patterns of thinking, studying and learning demanded by tertiary subjects such as
Law. Singh (1991: 8), working in the Malaysian context, confirms the importance of developing students’ thinking skills for successful law study:

it is essential to develop their critical thinking skills ... by providing conscious practice to determine the strength of authority, and recognize logical inconsistencies in a line of reasoning.

Bizzell (1986) writes of three types of problems that ‘basic’ writers face at tertiary level: a “clash among dialects” (standard versus non-standard English), a “clash of discourse forms” or genres, and a “clash of ways of thinking”. Students are confronted with an academic community that uses different language and discourse patterns that constitute a different world view, a world view with no “absolutes”. She writes that:

basic writers, upon entering the academic community, are being asked to learn a new dialect and new discourse conventions, but the outcome of such learning is acquisition of a whole new world view (p. 297).

Bizzell is describing then the epistemological shifts that are a necessary part of the acculturation process faced by all students entering the university discourse community. Students from minority groups, lower socio-economic backgrounds, and other languages and cultures experience the greatest degree of “culture clash”, of language or dialect, genres, and world view. Ballard and Clanchy (1988: 19) make a similar point when they write that university literacy “involves becoming acculturated: learning to read and write the culture” (i.e. the “culture of knowledge and its disciplinary sub-cultures”).

2.3 Assistance with tertiary language and learning

English for Academic Purposes (EAP) courses for students wishing to pursue higher academic studies in English are an important branch of the English for Specific Purposes (ESP) movement which has grown rapidly in the last twenty years as the language teaching profession has attempted to meet the diverse demands of industry, commerce and the professions for English language training for people from other cultures.

The focus in ESP courses is clearly on the learner and meeting the learner’s language needs and interests in his/her specialist area of work or study. The assumption behind the approach is that because the courses are clearly relevant to the learner’s needs, learners will be motivated and learn better and faster. Hutchison & Waters (1987: 19) maintain that while ESP may differ in content it is no different from any other form of language teaching in the processes of learning:

ESP ... is an approach to language teaching in which all decision as to content and method are based on the learner’s reason for learning.

EAP courses are often general academic “bridging” programs designed to prepare students for the demands of later tertiary level study (e.g. Engineering, Nursing) in
English. However, EAP and ESP courses designed to prepare ESL/EFL students for later specialist study in English have been criticised as being only “... marginally effective, as the language skills are divorced from the specialized content and intellectual strategies which can only arise in the context of the actual course of studies” (Ballard, 1987: 116).

Another model, labelled the “adjunct” model in the United States, has its roots in the language across the curriculum movement. Adjunct courses are English (ESL) courses which are linked to particular University content courses and provide integrated language instruction (reading, writing and study skills) using the content course materials. As Widdowson (1978: 16) argues, this integration “... not only helps ensure the link with reality and pupils’ own experience, but also provides us with the certain means of teaching language as communication, as use rather than simply usage”. A number of American authors have also advocated the linking of ESL and content in higher education (Snow and Brinton, 1988a, 1988b; Brooks, 1988; Benesch, 1988; Hirsch, 1988; Guyer and Peterson, 1988), sharing the assumption that:

ESL instruction in higher education should mediate between students’ previous experiences with English and formal learning and the new linguistic, cognitive, social and cultural demands of studying content in an American college in the target language (Benesch, 1988: 2).

Snow and Brinton (1988b) describe the Freshman Summer adjunct Program (FSP) at UCLA. In this program, students enrol concurrently in a content course such as Introduction to Psychology and a language course which is centred around the content area’s lectures and readings. Both courses are for credit, the language class being 12-14 hours contact per week and the content course 8 hours of lectures and tutorials. The underlying assumption of the approach is that:

Student motivation in the language class will increase in direct proportion to the relevance of its activities, and in turn student success in the content course will reflect the carefully co-ordinated efforts of this team approach (ibid: 570-571).

Student evaluation of the adjunct program was very positive overall regarding skills development with the reported additional benefits of increasing students’ self confidence and “ability to use UCLA facilities”.

The Learning Skills Program at the author’s university also follows the philosophy of integrating language and study skills instruction with course content. As Marshall (1989: 3) argues, this “... increases student motivation in developing appropriate skills and also reduces problems of transferring skills to required learning tasks”. Support classes that the author conducts for students studying the introductory commercial law course Principles of Commercial Law (C165) thus follow the adjunct model, but they
are not credit bearing. The aim of the classes is to build on the students' existing world knowledge of the law and legal concepts, principles and language by raising their awareness of important features of legal registers and genres and providing them with useful skills and strategies for successfully operating within this language domain. The classes closely follow the content course and the activities and exercises largely draw on authentic materials from the content course and are further described in Beasley (1994).

As has been mentioned previously, apart from the law study handbooks there are very few commercially available texts for the teaching of English for academic legal purposes. The approach advocated above makes the usefulness of these texts fairly limited in any case (especially structurally based materials such as Molyneux, 1972) because all materials have to be adapted to the students' actual content needs. Some materials, such as Spencer's (1980) work on noun-verb collocations, were originally produced as local in-house publications of isolated individual institutions. However, with the increasing numbers of Asian students studying business in Australia over the last few years, it is not surprising that there is now a handbook commercially available for these students on the study of business law (Crosling and Murphy, 1994). Papers that give practical strategies and approaches to the teaching of English for academic legal purposes (EALP) are also rather few and far between.

Bhatia (1982b, 1983b, 1984, 1989, 1993) has produced a number of publications which offer practical applications of linguistic analyses of legal texts for language teaching, chiefly legislation and legal cases. His chief contribution has been in the championing of the technique of "easification" over "simplification" of legal texts, arguing that the latter "do not help in developing efficient textual processing strategies in the learner because he does not get any opportunity to process the text for himself" in the EALP situation (Bhatia, 1983b: 45). "Easification", on the other hand, enables the learner to process authentic texts that have been made more accessible or "easified" by the laying out of the text diagrammatically so that their structure and meaning is more apparent. In the latter two publications cited above, Bhatia advocates the teaching of the complementarity of the discourse and cognitive structuring of cases and legislation as genres to students arguing that:

In principle, cases are attempts to interpret the facts of the outside world in terms of general abstract principles known to specialists in law as ratio decidendi, whereas the essence of legislative interpretation lies in an attempt to understand the general abstract rules which in themselves are nothing but attempts to account for the facts of the world. ... The two processes, therefore, are complementary to each another and any attempt to neglect one at the cost of the other is likely to leave the learners somewhat less than proficient in the use of legal language in the advancement of their professional career (Bhatia, 1989: 223).
Calderbank (1982) presents a number of practical strategies for studying cases as problem solving exercises which involve developing students' reading skills at extracting factual details and comparing and contrasting factual details and their legal implications. Wickrama (1982b) has utilised Lehrer's componential analysis in exercises devised to help non-native English speakers classify and clarify types of contracts and terms of contracts in commercial law.

However, Swales (1986, 1990) emphasises the need for language teachers to fully understand the communicative purposes of the genres they are aiming to help students with in order to ensure appropriate tasks for their students. Swales (1990: 73) recounts his own experiences in an EALP course teaching reading strategies using the facts of legal cases, i.e. treating the discourse purely as a narrative without relating the facts given to the decision that was reached in the case. He was inadvertently teaching an inappropriate reading strategy for these students when what they needed "was not to understand - and retain the gist of - a narrative, but to spot the crucial fact on which the decision (rightly or wrongly) rested".

Lundeberg (1987) has shown that the metacognitive reading strategies that experts (lawyers and law professors) use when reading legal cases can be successfully taught to novices and their comprehension significantly improved as a result. These strategies are rarely taught to students, however, because of the "paradox of expertise", the fact that the experts are often not consciously aware of the skills and strategies that they employ. As Lundeberg (1987: 409) puts it, "experts who engage in a process automatically probably do not know how they know what they know".

An important task of the language and study skills professional at tertiary level is to provide activities and materials that help make the experts' strategies and the discourse conventions of the genres within a disciplinary culture explicit and accessible to students because of the "paradox of expertise" and the "invisible discourse" (White, 1982) that operates.

Crosling (1991) writes of her adjunct classes for business law students which aim to explicate the culture of the subject for students. Her approach is based on the following two premises: that "making the intellectual culture explicit for new learners is the best way of helping them effect a successful integration into it" (Ballard & Clanchy, 1988: 13) and that "particular discourse structures ... habituate disciplined thinking" (Bock, 1984).

Some law educators espouse the notion of "discovery learning", the need for students to flounder and feel pain in order to learn to think like lawyers (Bryden, 1984).
1988: 32), the practice of which leads to greater expertise\(^1\). She illustrates this in connection with the teaching of legal problems in business law proposing three steps: understanding the problem (exploring lexicogrammatical features and developing reading and note-taking skills), isolating the areas of dispute (the questions), and composing and writing the answer (exploring discourse structure). Crosling (1991: 11) emphasises the need to teach the discourse structure:

Students need to know how the discourse proceeds. This process is implied in the text and lectures, but often needs to be made explicit for non-English speaking background overseas students who, perhaps because of lack of acculturation time, may not have "picked up" the implicits.

The present research shares this view and is motivated by a desire to help students "pick up the principles" of commercial law by making the linguistic features and cognitive structuring of answers to legal problems explicit and thus more accessible. The next chapter explores a number of approaches to analysing the linguistic features of written texts and genres and maps out the theoretical and methodological approach which has been adopted in this study.

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\(^1\)However, some authors such as Freedman (1993) argue that there is no hard evidence from language acquisition studies that explicit teaching of "particular discourse structures" or genres enhances student learning and ability to write appropriately in these genres. The so-called "process versus genre" debate will be examined in the following chapter.
CHAPTER 3
RESEARCH METHODOLOGY

3.1 Approaches to the analysis of written text

Cohesion and coherence

Research in the area of connected written text is truly vast and from many perspectives including education (composition and rhetoric), cognitive psychology, and linguistics. Halliday and Hasan’s seminal work (1976) on cohesion has been by far the most influential in this area and has been employed in the study of literary texts (Gutwinski, 1976), academic texts in the sciences and social sciences (Binkley, 1983), and numerous studies of both first and second language reading comprehension and writing.

Cohesion, according to Halliday and Hasan (1976), is “the set of semantic resources for linking a SENTENCE with what has gone before” (p.10). They outline in great detail five major types of discourse tie: reference, substitution, ellipsis, conjunction, and lexical cohesion. Substitution and ellipsis are largely features of spoken texts and so will not be discussed further.

Research on first language learners by Chapman (1983) and second language learners by Cooper (1984) both attest to the close relationship between reading comprehension and understanding of cohesive ties. Acquisition of connectives (conjunctive ties) is certainly not complete by early adolescence (Flores d’ Arcais, 1980) and “is only achieved by some pupils late in the secondary school, and yet, ironically, reading itself, unless remedial ... is hardly taught in later schooling” (Chapman, 1983: 53). Furthermore, Cooper (1984: 128) maintains that:

there is strong evidence for proposing that practised readers are distinguished from unpractised readers by their ability to use the whole context to decode the meaning of unfamiliar words, and that this ability involves an understanding of semantic relationships created by subordinators, sentence connectors and lexis.

Research into writing proficiency and cohesion with native speakers (L1) and with non-native speakers (L2), likewise, show similar results. Pritchard (1980) and Witte and Faigley (1981) in studies of good and poor L1 writers concluded that the number of cohesive devices is not a measure of writing quality or coherence and that poor writers’ use of cohesive devices “either creates, or, at least, does not resolve coherence problems” (Pritchard, 1980). Similarly, studies with L2 writers (Connor, 1984; Mann, 1986; Khalil, 1989) show that there is a low correlation between the quantity of
cohesive ties and judged coherence of students’ writing. The significant findings, however, are that both poorer L1 and L2 writers displayed a limited range of cohesive ties. They relied much more heavily on "lexical and conceptual redundancy" (Connor, 1984: 307) and "underused other lexical and grammatical cohesive devices" (Khalil, 1989: 359).

There are conflicting results in the educational literature on the importance of explicit connectives in both reading and writing and the perceived difficulty of the implicit connection of ideas. A number of studies which contrasted good and poor first language readers demonstrated that explicit connectives significantly improved comprehension for poorer readers and that comprehension was likewise impaired when explicit ideas were made implicit (Kintsch, 1974; Irwin, 1980; Goldsmith, 1982; Warren, 1986; Brozo and Curtis, 1987). However, an equally large number of studies with second language learners and some with native speakers found that explicit signalling had no significant effect and in some cases a negative effect on comprehension (Howard, 1983; Cooper, 1984; Woolard, 1984; Crewe et al., 1985; de Oliveira Alban, 1986). Woolard (1984: 202) found that removing explicit signals made some texts more difficult but not others and concluded that the "extent to which a relation remains recoverable partly depends on the presence of other information in the text relevant to the establishment of the relation", such as the information structure of the text.

Many deficiencies have been noted, however, with Halliday and Hasan’s 1976 model of text connectedness or cohesion, such as its restriction to inter-sentential connection and its inability to cater for implicit connection (Woolard, 1984). There has also been much debate over the definition and relationship between cohesion and coherence (Carrell, 1982) and the failure to acknowledge the interactive nature of reading and the knowledge or schema that the reader brings to the text. Moreover, many important features of textual cohesion are not accommodated in Halliday and Hasan’s original model such as the role of subordinators, structural parallelism, and a whole class of lexical signals of semantic relations (Winter, 1977). Connor (1984: 311), citing Enkvist (1978), lists the following:

- patterns in which information flows through successive sentences (old and new information),
- sequences of tenses that contribute to textual units, consistencies of point of view, and what Enkvist calls ‘iconic’ patterning of text (rhythm, sound assonance, alliteration and rhyme, and balanced sentence structure).

Ehrlich (1988) examines two restrictions on the distribution of cohesive devices that need to be explicitly incorporated into Halliday and Hasan’s system in order to achieve cohesion. Referential linking “depends upon referring to noun phrases which are
prominent or 'in focus' within a discourse" (p.114) and similar restrictions apply for semantic connectors which "must connect propositions which are contained within dominant clauses of adjacent sentences in order for cohesive discourse to result" (p.116). Several examples are given of L2 learners' writing which fails to achieve cohesion because of violations of the above principles.

Winter's (1977) work extends the notion of lexical cohesion and shows how logical relations can be signalled lexically (as well as by subordinators and connectives) and how certain lexical items impose restrictions on the creative lexical choices in other clauses. Winter, following an interactional approach, uses questions as a fundamental criterion for examining the grammar and semantics of the clause and classifies clausal relations into two types, matching relations and logical sequence relations, maintaining that:

readers are normally able to anticipate the relations that are to come; put it more naturally, they are able to guess what questions are going to be answered (Hoey and Winter, 1986: 126).

Hoey (1983) and Jordan (1980) extend Winter's work on lexical signalling and clause relations to encompass the metastructure or rhetorical patterns of texts exploring in depth the so-called Problem-Solution macro-discourse pattern that underlies many texts. Crombie (1985) further reshapes Winter's ideas developing nine general categories of semantic relations between propositions. The approach of Winter et al. incorporates notions of information structure with the function of subordinators seen as "to present some part of the information as inherent or given or known to the situation" (Hoey and Winter, 1986: 122) as well as the recognition of tense and systematic repetition as signals, with the latter allowing new information to be added to the clause and providing a focus for it.

However, much of the work mentioned above fails to account adequately for the sociolinguistic dimensions of language, that is, language in use in social contexts. Furthermore, with the notable exception of the work of Hoey and Jordan, the studies above are primarily restricted to cohesive features at the clause and sentence level rather than dealing with the rhetorical and generic structure and discourse features of whole texts.

3.2 Genre analysis

Early studies on the language used in differing social contexts (e.g. Reid, 1956; Halliday et al., 1964) led to the development of the notion of register:

Language varies as its function varies; it differs in different situations. The name given to a variety of language distinguished according to its use is register. (Halliday et al. 1964: 87)
This work was primarily focussed on quantitative analyses of the surface linguistic features (lexical and syntactic) of the language used in different fields, e.g. science, medicine, the law, and led to the production of specialised English teaching (ESP) materials. However, as Swales (1990) and Bhatia (1993) point out, these studies are limited to describing surface features and do not examine communicative purposes and genre conventions and consequently “do not provide adequate insights about the way information is structured in a particular variety” (Bhatia, 1993: 6). Indeed, Swales (1990: 3) considers that the use of registral labels for language varieties “can now be seen to be systematically misleading” in that it blurs the generic distinctions between texts from the same field which have different communicative purposes, e.g. legislative writing, law textbooks, and legal case reports (Bhatia, 1983a).

Later work by Halliday (1978) and others in the systemic functional linguistic tradition (Halliday & Hasan, 1985; Martin 1984, 1992; Matthiessen, 1993) has considerably developed the register concept and integrated it into a theory of language that fully incorporates genre. The systemic functional linguistic approach will be discussed in detail below. However, before examining this approach, the approaches taken by various authors to the concept of genre will be now reviewed, including a brief discussion of the process/genre debate that has preoccupied many in the educational field over the past decade.

Kay (1994) provides a useful overview of the development of the notion of genre in the linguistic and educational literature, which Swales (1990: 33) has described as “a fuzzy concept”. She bases her paper around the seminal work of Miller (1984) who defines genres as typified responses to recurring situations and conceives of them as belonging to two kinds of hierarchies: a hierarchy of “classes” of discourses or a hierarchy of “constituents”. The former conception is seen in the use of the term genre in various contexts to refer to, for example, all public addresses in a society, all inaugural speeches, or all US presidential speeches. The hierarchy of “constituents” model can be seen in Miller’s communication hierarchy which has “human nature” at the highest level of the ladder, “culture” on the next rung, then “form of life” (for cultural patterns like religion), “genre”, “episode/strategy”, “speech act”, “locution”, “language”, and lastly on the base level “experience”, with form existing at each level. Fundamental to genre theory for Miller is the concept of rhetorical action which involves situational context, motives and conventions.
Figure 3.1: Pedagogical model of genre

(from Kay, 1994: 71)
Under the “constituents” hierarchy comes work by Freadman (1987) and linguists in the systemic functional paradigm (Halliday, 1978; Halliday and Hasan, 1985; Martin, 1984, 1985a, 1992; Christie, 1985, 1990, 1993; Kress, 1985; Houghton, 1988) as well as work by Swales (1990) and Bhatia (1993). This work will be considered in more detail in subsequent sections below. Kay (1994) places the work of Dudley-Evans (1987); Carter (1988a, b); Virtanen (1992) and Hatch (1992) under the “classes” hierarchy model. These authors conceive of sub-genres within genres; macro-genres and micro-genres; and genres, discourse types, text types / rhetorical genres / text genres respectively.

Figure 3.1 (above) represents Kay’s (1994) pedagogical model synthesised from the above research which illustrates “how much is involved in the production (and thus in the reception) of texts” (p. 72). She goes on to give a number of pedagogical examples of how this model can be used to focus on different levels or aspects of a particular genre in EAP classrooms, advocating a “transgeneric” approach utilising not only generic structure, but also rhetorical structure and topic-types across genres and disciplines (p. 73).

However, the pedagogical applications of genre theory have been hotly debated over the last decade, with considerable polarisation taking place in educational circles in the process. Kay (1994), Bamforth (1992/3) and Lee (1990) argue against this polarisation and that the process versus genre divide is “a false dichotomy” (Bamforth, 1992/3). As Bamforth explains, the debate is between two competing paradigms: the ‘process’ approach as the dominant orthodoxy in the 60s and 70s being challenged by the ‘genre’ approach of the 80s and 90s. The former paradigm stresses individual creativity and conferencing rather than rules and the surface structure of texts because it is the process of writing itself that generates new ideas and text. The genre approach, on the other hand, “has sought to shift the focus to what is written, by whom and in what context” (Bamforth, 1992/3: 92) because it emphasises the social and convention-bound nature of language with texts serving particular purposes in social contexts. Genre protagonists have criticised the process camp for a failure to connect with the social basis of language and “empower” students by making “explicit to learners the knowledge they need to gain access to socially powerful forms of language” (Burns, 1990: 62). The genre approach, on the other hand, has been criticised for its perceived rigidity and “formulaic parroting” of generic structures and forms (Swales, 1990: 16), tending “towards a technicist and behaviouristic view of writing” (Bamforth, 1992/3: 97). Widdowson (1983: 102) points out that:
the danger of such analysis is that in revealing typical textualisations it might lead us to suppose that form-function correlations are fixed and can be learned as formulae, and so to minimise the importance of the procedural aspect of language use and learning.

Kay (quoting Green, 1987) argues for an integration of “the contextualist arguments of the 'process' position with the 'textualist' arguments of the 'genre' position” (p.76). Lee (1990: 73) concurs advocating that “elements of both should be strategically appropriated, framed by a spirit of more critical inquiry into the relationship between writing and learning”. Bamforth (1992/3: 95) similarly argues for ‘a new synthesis’ where both approaches have their place:

   Teachers do not necessarily have to choose between them but rather they can draw upon elements which suit their styles, their educational ideology and the needs of their students. Neither approach by itself is likely to provide all the appropriate techniques for teaching writing. ... process writing may be a valuable approach even when a particular academic genre is established and readily identified. Conversely, attention to genre will be important in creative writing.

The author agrees that the polar opposition of the two approaches is misconceived and that the realities of teaching often demand an eclectic approach where the insights and usefulness of different theoretical perspectives are utilised as appropriate to meet the individual needs of students in differing situations and contexts. Finally, as Kay (1994: 76) suggests, “we can nurture the individual as individual and as a member of society by maintaining a flexible approach, giving the students the tools with which they can make their own, informed decisions”.

The Swalesian approach

Recent work on genre analysis by John Swales (1990) is based around the notion of a discourse community, a related concept to the sociolinguistic term, speech community. Swales (1990: 24-27) proposes six defining characteristics of a discourse community: a group of language users that (1) has “a broadly agreed set of common public goals”, (2) has “mechanisms of intercommunication among its members”, (3) “uses its participatory mechanisms primarily to provide information and feedback”, (4) “utilizes and hence possesses one or more genres in the communicative furtherance of its aims”, (5) “in addition ... has acquired some specific lexis”, and (6) “has a threshold level of members with a suitable degree of relevant content and discoursal expertise”. This is a useful concept that has clear relevance to students at tertiary institutions who, as explored in the previous chapter, frequently interact in an apprentice-like role with a number of academic and professional discourse communities in the course of their tertiary studies.

Swales (1990: 45-58) lists five criterial observations which he feels are essential in defining a genre: a genre is a class of communicative events; a genre possesses a shared set of communicative purposes; exemplars or instances of genres may vary in their
prototypicality; the rationale behind a genre establishes constraints on allowable contributions in terms of their content, positioning and form; and a discourse community’s nomenclature for genres is an important source of insight. Bhatia (1993: 13), in building on Swales’s work, emphasises the primacy of the communicative purposes of a genre “identified and mutually understood by the members of the professional or academic community in which it regularly occurs”, its conventionalised structure which operates within definite linguistic and pragmatic parameters or “constraints on allowable contributions”, and the frequent exploitation of these constraints “by expert members of the discourse community to achieve private intentions within the framework of socially recognized purpose(s)”. 

**Table 3.1: CARS model of article introductions**

<table>
<thead>
<tr>
<th>Move 1</th>
<th>Establishing a territory</th>
</tr>
</thead>
<tbody>
<tr>
<td>Step 1</td>
<td>Claiming centrality</td>
</tr>
<tr>
<td></td>
<td>and/or</td>
</tr>
<tr>
<td>Step 2</td>
<td>Making topic generalization(s)</td>
</tr>
<tr>
<td></td>
<td>and/or</td>
</tr>
<tr>
<td>Step 3</td>
<td>Reviewing items of previous research</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Move 2</th>
<th>Establishing a niche</th>
</tr>
</thead>
<tbody>
<tr>
<td>Step 1A</td>
<td>Counter-claiming</td>
</tr>
<tr>
<td></td>
<td>or</td>
</tr>
<tr>
<td>Step 1B</td>
<td>Indicating a gap</td>
</tr>
<tr>
<td></td>
<td>or</td>
</tr>
<tr>
<td>Step 1C</td>
<td>Question-raising</td>
</tr>
<tr>
<td></td>
<td>or</td>
</tr>
<tr>
<td>Step 1D</td>
<td>Continuing a tradition</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Move 3</th>
<th>Occupying the niche</th>
</tr>
</thead>
<tbody>
<tr>
<td>Step 1A</td>
<td>Outlining purposes</td>
</tr>
<tr>
<td></td>
<td>or</td>
</tr>
<tr>
<td>Step 1B</td>
<td>Announcing present research</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Step 2</th>
<th>Announcing principal findings</th>
</tr>
</thead>
<tbody>
<tr>
<td>Step 3</td>
<td>Indicating RA structure</td>
</tr>
</tbody>
</table>

(Swales, 1990: 141)

Swales (1984, 1987, 1990), Hopkins & Dudley-Evans (1988) and Bhatia (1993) have explored academic research writing across disciplines, focussing on research articles
(RAs) in particular. Swales (1990) examines the structure of the research article genre in terms of its overall schematic structure of Introduction - Method - Results - Discussion (IMRD) and the various moves and sub-moves or steps that typically characterise each section. For example, he proposes the three-move “CARS” (Create a research space) model for the typical generic structure of article introductions which is illustrated in Table 3.1 above.

He also explores the range of linguistic realisations of the moves and steps of the various sections of research articles across many disciplinary fields. There is certainly some degree of variation between disciplines "in the degree of standardization and of the presence of the nominalized impersonal style" for example, but Swales does demonstrate in considerable detail that there are "certain characteristics of RAs which, by and large, tend to occur and recur in samples drawn from an extensive range of disciplines" (p.175). It is clear, as Swales points out, that:

RAs are rarely simple narratives of investigations. Instead, they are complexly distanced reconstructions of research activities, at least part of this reconstructive process deriving from the need to anticipate and discountenance negative reactions to the knowledge claims being advanced. And this need in turn explains the long-standing (Shapin, 1984) and widespread use of 'hedges' as rhetorical devices both for projecting honesty, modesty and proper caution in self-reports, and for diplomatically creating research space in areas heavily populated by other researchers. (ibid)

This work has obvious pedagogical applications for developing both native and non-native students' language and learning skills, particularly at the post-graduate level. Swales maintains that there is a widespread lack of conscious knowledge of the schema of research articles and that there "may be pedagogical value in sensitising students to rhetorical effects and to the rhetorical structures that tend to recur in genre-specific texts" (p. 213). Indeed, Murison and Webb (1991) and Webb (1991) have utilised the work of Swales et al. (above) and Hyland (1990), as well as the insights from the systemic functional approach to genre, to produce teaching and learning materials for university students at postgraduate (research article writing) and undergraduate level (argumentative essay writing).

The Systemic functional approach

The Swalesian approach with its focus on conventionalised structure and communicative purpose as the rationale for a genre sits comfortably with the systemic functional work on genre (Halliday & Hasan, 1985; Martin, 1984, 1992) which relates language use (phonology, lexicogrammar, and discourse semantics) to purpose and social context (register, genre, and ideology). Systemic functional linguistics accounts for language in its social context by relating language form, function and use conceiving of language as a "resource for meaning" rather than as a "system of rules" (Martin, 1992: 3). It is
concerned with "the meaning making potential of language within a given social context" and thus "offers a semantically based framework for describing the choices made in lexicogrammar in terms of their functions and purpose within a given situation and culture" (Drury & Webb, 1991b: 214).

Figure 3.2 (below) is based on Martin's (1992: 496) representation of language and its semiotic environment and Callaghan and Rothery's (1988: 34) representation of the relationship between text and context. This diagram concentrically maps the various levels of the language system, from the phonological (syllables and phonemes), the lexicogrammatical (the clause), and the discourse semantic (beyond the clause level), and its situational and cultural contexts (register, genre and ideology). The terms context of situation and context of culture derive from the work of the anthropologist Malinowski, whose work with Trobriand Islanders in the South Pacific led to the development of these terms to encapsulate the notions that language occurs not only within a given social or situational context, but that this social situation is itself part of a certain cultural context and is only fully comprehensible within this total framework.

Figure 3.2: Language and its semiotic environment
<table>
<thead>
<tr>
<th>INFORMATION</th>
<th>TONE</th>
<th>UNIT</th>
<th>INTERPERSONAL</th>
<th>IDEATIONAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>WORD</td>
<td></td>
<td>ITEM</td>
<td>WORD CONTENT</td>
<td></td>
</tr>
<tr>
<td>(taxonomic organization of vocabulary)</td>
<td></td>
<td></td>
<td>(expressive words)</td>
<td></td>
</tr>
<tr>
<td>Adverbal</td>
<td>GROUP</td>
<td>classes of circumstantial propositional relations</td>
<td>(semantic roles)</td>
<td>Logical</td>
</tr>
<tr>
<td>Normal</td>
<td>GROUP</td>
<td>(noun classes)</td>
<td>(temporal)</td>
<td>Logical</td>
</tr>
<tr>
<td>epiphany</td>
<td>GROUP</td>
<td>(adjective classes)</td>
<td>(identity)</td>
<td>Logical</td>
</tr>
<tr>
<td>MODIFICATION</td>
<td>TENSE</td>
<td>(verb classes)</td>
<td>(modality)</td>
<td>Logical</td>
</tr>
<tr>
<td>CLAUSE</td>
<td>PERSON</td>
<td>(marked options)</td>
<td>(identification)</td>
<td>Logical</td>
</tr>
<tr>
<td>TRANSITIVITY</td>
<td>THEME</td>
<td>(comparative options)</td>
<td>(identification, predication)</td>
<td>Logical</td>
</tr>
<tr>
<td>HYPOTACTIC COMPLEXES OF CLAUSE, GROUP &amp; WORD</td>
<td></td>
<td></td>
<td>(definite article)</td>
<td>Logical</td>
</tr>
<tr>
<td>PARATACTIC COMPLEXES (all ranks)</td>
<td></td>
<td></td>
<td>(classes of circumstantial comment adjunct)</td>
<td>Logical</td>
</tr>
<tr>
<td>COHESION ('above the sentence': non-structural relations)</td>
<td></td>
<td></td>
<td>(realization)</td>
<td>Logical</td>
</tr>
</tbody>
</table>

Table 3.2: Language mechanisms
Language choices occur in characteristic configurations in social situations and constitute distinct discourse types (registers or genres) that are realised in texts by lexicogrammar, textual organisation and a definable structural shape or 'generic structural potential' (Hasan in Halliday & Hasan, 1985: 64) that is identified with the genre. Essential to the idea of genre is the realisation of some communicative purpose that is being served. Halliday conceives of the social context in terms of the situational variables of the field, tenor, and mode of the discourse which define the register. These contextual variables of semiotic meaning correlate with "the functional components of the semantic system of a language: (a) ideational, subdivided into logical and experiential; (b) interpersonal; and (c) textual" (Halliday & Hasan, 1985, p. 29). The field tends to determine the ideational meanings, the tenor the interpersonal meanings, and the mode the textual meanings respectively.

Table 3.2 (above) details how these three metafunctions of language are realised at various ranks or levels of language from the individual word, the word group, the clause to "above the sentence".

**TEXTUAL meanings**

Halliday (1985a: 53) defines the textual meaning of language as:

> relevance to the context: both the preceding (and the following) text, and the context of situation.

The textual function of the clause is that of constructing a message.

The textual metafunction is realised at the clause level by theme; at the group level by 'contrastive' options of voice in the verbal group, deixis in the nominal group, and conjunction in the adverbial group; at the word level by the collocational organisation of vocabulary; above the sentence level by the systems of cohesion: reference, substitution and ellipsis, conjunction, and lexical cohesion; and in spoken discourse by the distribution and focus of given and new information in the tone group (Halliday, 1973: 141). (See Table 3.2, above).

Because substitution and ellipsis are cohesive resources that are manifested chiefly in spoken discourse and are thus far less important in written texts, they will not be further discussed here.

**Reference**

The reference system involves the use of a set of pronouns, adjectives and adverbs that signal phoricity, i.e. they refer "to something already present in the verbal or non-verbal context" (Halliday, 1985a: 275). This phoricity can chiefly be exophoric, i.e. refer to
“some person or object in the environment” (ibid: 290), anaphoric, i.e. “point not ‘outwards’ to the environment but ‘backwards’ to the preceding text” (ibid: 291), or cataphoric, i.e. pointing forward to something that is to come in the text. The three groups of referents that contribute to textual cohesion according to Halliday (1985a: 295) are the PERSONALS (the personal pronouns and their possessive adjectives), the DEMONSTRATIVES (this/that etc., here/there, and the anaphoric “the”), and the COMPARATIVES (identity, similarity and difference adjectives and adverbs like equal, and likewise; and comparatives like more and bigger etc.).

Conjunction

Conjunction is the type of cohesion that expresses the logical connections between propositions in discourse and occurs when “a clause or clause complex, or some longer stretch of text” is “related to what follows it by one or other of a specific set of semantic relations” (Halliday, 1985a: 289).

Considerable differences are apparent amongst the many authors who have attempted to classify the system of logico-semantic relations in English and also amongst linguists in the systemic functional tradition. For example, Halliday and Hasan (1976) proposed four major relations: additive, adversative, temporal and causal based on the “cohesive” or inter-sentential connectives typified by and, yet, then and so. However, Halliday (1985a) completely reorganised the network according to the system devised for clause complex analysis, namely the relations of elaboration, extension, and enhancement. Martin (1983), on the other hand, developing a classification starting from hypotactic relations, formulated four main categories of additive, comparative, temporal, and consequential logico-semantic relations plus an additional locative category. Martin (1992) points out that all three classifications are very similar in their treatment of the “additive, temporal, and consequential categories for the meanings clustering around the ‘prototypical’ and, then, and so” (p. 171) with the major differences appearing in the adversative (Halliday and Hasan, 1976), elaborating (Halliday, 1985a), and comparative (Martin, 1983) relations, partly due to the “essential indeterminancy of some of the relations themselves” (p. 176), citing the problem of the categorising of alternation (or) and contrast (whereas) relations as a prime example. Martin (1992: 178) emphasises the importance of the similarity/difference opposition, recognition of which further enables Conjunction to be

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1 Halliday also defines referents that are homophoric, i.e. they “are self-specifying; there is only one - or at least only one that makes sense in the context, as in Have you fed the cat?” (ibid: 293), while Martin (1992: 123) utilises the term esphoric reference for “forward reference within the same nominal group”. Esphoric reference is signified by “the” and points to information in modifying elements in the nominal group, typically qualifiers and is used in contradistinction to cataphoric reference which is “forward reference between groups” (ibid).
inter-related to Negotiation (comply/resist), Identification (semblance/difference) and Ideation (synonym/antonym) in the discourse system.

Halliday (1985a) and Martin (1985a, 1992) also subclassify conjunction into external or internal conjunction, i.e. according to whether it “relates propositions about the real world to each other” or whether it “relates speech acts to each other, making connections in what might be termed the rhetorical world of discourse” respectively (Martin, 1985a: 90). The classification of conjunction adopted here is derived from the Martin (1983) system as outlined by Martin (1985a: 91) and (1992: 197) which divides the conjunction network into four groups of logical semantic relationships: Additive (which includes addition, and alternation), Comparative (which includes contrast and similarity), Temporal (which includes simultaneous and successive), and Consequential (which includes manner, consequence, condition, and purpose with concession crossclassifying these four) plus an additional minor Locative category. Table 3.3 (below) sets out Martin’s classification of conjunction.

Table 3.3: Classification of Conjunction

<table>
<thead>
<tr>
<th>Major Category</th>
<th>Sub-category</th>
<th>Abbreviation</th>
</tr>
</thead>
<tbody>
<tr>
<td>temporal:</td>
<td>simultaneous</td>
<td>simul</td>
</tr>
<tr>
<td></td>
<td>successive</td>
<td>succ</td>
</tr>
<tr>
<td>consequential:</td>
<td>manner</td>
<td>mann</td>
</tr>
<tr>
<td></td>
<td>consequence</td>
<td>consq</td>
</tr>
<tr>
<td></td>
<td>condition</td>
<td>cond</td>
</tr>
<tr>
<td></td>
<td>purpose</td>
<td>purp</td>
</tr>
<tr>
<td>(consequentials involving counter-expectation)</td>
<td>concessive</td>
<td>conc</td>
</tr>
<tr>
<td>comparative:</td>
<td>similarity</td>
<td>simil*</td>
</tr>
<tr>
<td></td>
<td>contrast</td>
<td>contr</td>
</tr>
<tr>
<td>*(common internal reformulation comparatives of similarity further distinguished)</td>
<td>exhaustive</td>
<td>i.e.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>exemplifying</td>
</tr>
<tr>
<td>additive:</td>
<td>addition</td>
<td>add</td>
</tr>
<tr>
<td></td>
<td>alternation</td>
<td>alt</td>
</tr>
<tr>
<td>locative:</td>
<td></td>
<td>loc</td>
</tr>
</tbody>
</table>

Lexical cohesion

Halliday (1985a: 310-3) identifies three types of cohesive lexical tie: Repetition, Synonymy, and Collocation. Repetition naturally refers to repeating the same lexical item or its inflexional variants while Synonymy is used for a much broader group of related lexical items ranging from synonyms in the strict sense of having “the same meaning in a particular context as another word” (Crystal, 1987: 431), superordinates (a
ism at a higher level of generality), *hyponyms* (related specific words that have a common superordinate), *meronyms* (words related by a part-whole relationship), and finally *antonyms* (words that are opposite in meaning). Collocation, on the other hand, simply means “a tendency to co-occur” (Halliday, 1985a: 312) such as the words *pipe* and *smoke* or the words *cold* and *ice*.

**Thematic Progression**

At the clause level, textual meanings are encoded through the Theme, a concept derived from the Prague linguists’ work on “functional sentence perspective”. The Theme is the “point of departure of the message ... the ‘as for’, ‘as far as ... is concerned’ function” (Halliday, 1985a: 56). Thematic progression or Theme/Rheme analysis, for Halliday, is distinct from given/new information structure “making different contributions to the shape of the clause, including the order of the elements in it” (ibid: 56). The Theme comprises the components that begin each sentence or clause complex up to and including the Topical Theme (the first ideational component), and may be *marked* (an Adjunct, or Complement) or *unmarked* (grammatical Subject). Other types of Theme that may also be present are Textual (realised by conjunctives) or Interpersonal (realised by adverbials that express attitude). Martin (1985a: 93) writes that “the ‘point of departure’ of English clauses reflects discourse patterns relevant to the structure of paragraphs and essays as a whole” and “provides the method of development from one message to the next” (Callaghan & Rothery (1988: 36).

Perera (1993) has examined the thematic structure of texts from various content areas and describes the various ways that thematic continuity can be achieved. She describes the thematic progression in texts in spatial terms such as “looping” (where the theme is reiterated in successive sentences “looping” over the rhematic structure in each case, e.g. thematic “I” in some narratives), “chaining” (where the rhemes of the preceding sentences are picked up by or “chained” to the themes that follow), “leapfrogging” (where the thematic antecedent is more remote and thus “leapfrogs” over intervening themes and rhemes), and finally the “radiating” pattern (where the themes all relate to a single preceding theme - the “hypertheme”). She also examines the various linguistic expressions of the reiterations and speculates on the processing difficulty of the various types, concluding that remote links are harder than immediate ones and that reiterations that involve paraphrase and inference based on general world knowledge are considerably harder than those involving repetition, substitution, and synonymy. Furthermore, she concludes that texts that have frequent unlinked new themes produce comprehension difficulties by creating “jerkiness”.

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At the level of the verbal group, the textual metafunction is realised in the contrastive options of voice in the text (Halliday, 1973: 141). As Matthiessen (1992: 499) points out, the system of voice "is the resource for varying the mapping between Subject and the different types of participant in the clause". Unlike theme which can involve either participants or circumstances being given thematic status, voice can only confer subjecthood to participants. The choice of active or passive voice determines the form of the verbal group and involves the option of not specifying the Agent in what Halliday (1985a: 150) calls effective clauses ('true' passive clauses, i.e. with the feature of agency) or of not specifying the Medium in middle clauses (clauses without the feature of agency). The examples below taken from Halliday (ibid: 151) illustrate some of these possibilities:

<table>
<thead>
<tr>
<th>Effective clause: Active voice</th>
<th>Process</th>
<th>Medium</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The cat</td>
<td>broke</td>
<td>the glass</td>
</tr>
<tr>
<td>2. The duke</td>
<td>gave</td>
<td>my aunt</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Effective clause: Passive voice</th>
<th>Process</th>
<th>Agent</th>
</tr>
</thead>
<tbody>
<tr>
<td>1a. The glass</td>
<td>was broken</td>
<td>by the cat</td>
</tr>
<tr>
<td>1b. The glass</td>
<td>was (or got) broken</td>
<td></td>
</tr>
<tr>
<td>2a. My aunt</td>
<td>was given</td>
<td>this teapot</td>
</tr>
<tr>
<td>2b. My aunt</td>
<td>was given</td>
<td>by the duke</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Middle clause: Active voice</th>
<th>Process</th>
<th>Range</th>
</tr>
</thead>
<tbody>
<tr>
<td>3. The audience</td>
<td>enjoyed</td>
<td>the music</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Middle clause: Passive voice</th>
<th>Process</th>
<th>Medium</th>
</tr>
</thead>
<tbody>
<tr>
<td>3a. The music</td>
<td>was enjoyed</td>
<td>by the audience</td>
</tr>
<tr>
<td>3b. The music</td>
<td>was enjoyed</td>
<td></td>
</tr>
</tbody>
</table>

In the first example above of the breaking of the glass, the choice of passive enables the speaker/ writer "(1) to get the Medium as Subject, and therefore as unmarked Theme ("I'm telling you about the glass"); and (2) to make the Agent either (i) late news, by putting it last (‘culprit: the cat’), or (ii) implicit, by leaving it out" (ibid: 151). So the options provided by the system of voice are clearly important in terms of the method of development of a text.
Deixis (Nominal Groups)

Below the level of the clause, the textual metafunction is realised in the deixis which occurs within the nominal group through determiners and phoric elements such as the definite article and qualifiers (Halliday, 1973: 141). Deictics that refer either forward or backward between clauses in the text have been dealt with already in the discussion (above) on the reference system of cohesion.

Collocation

Collocation has been defined simply as “a tendency to co-occur” (Halliday 1985a: 312) and is certainly “one of the factors on which we build our expectations of what is to come next” (ibid: 313). Halliday also maintains that it often has strong associations with a particular functional variety or register of language.

**IDEATIONAL meanings**

Halliday (1985a: 53) defines ideational meaning as:

> the representation of experience: our experience of the world that lies about us, and also inside us, the world of our imagination. It is meaning in the sense of 'content'. The ideational function of the clause is that of representing what in the broadest sense we can call 'processes': actions, events, processes of consciousness, and relations.

The ideational metafunction of language meaning is further subdivided by Halliday into experiential and logical meanings. These meanings are expressed at the rank of the clause through the transitivity system (types of processes, participants, and circumstances), and the systems of polarity and taxis; at the group level through the verb tense system, the modification of nominals, and the ‘minor processes’ of the adverbial group (including prepositional); down to the word level as lexical ‘content’ or taxonomic organisation of vocabulary (Halliday, 1973: 141). (See Table 3.2, above).

Transitivity

Transitivity, according to Halliday (1985a: 101), “is the reflective, experiential aspect of meaning” and “specifies the different types of process that are recognised in the language, and the structures by which they are expressed”. Six processes are recognised in the system: Material processes (doing), Mental processes (sensing), Relational processes (being), Verbal processes (saying), Behavioural (behaving), and Existential processes (existing).
Polarity

Polarity, "the choice between positive and negative, as in is/isn't, do/don't" (Halliday, 1985a: 85), is a feature of the logical subdivision of the ideational metafunction.

Taxis

Taxis, or the type of interdependency between clause complexes, group or phrase complexes, or word complexes is also a feature of the logical subdivision of the ideational metafunction. There are two types of interdependency: HYPOTAXIS, which involves a subordinating or dependent relationship, and PARATAXIS, which involves a co-ordinating relationship "between two like elements of equal status, one initiating and the other continuing" (Halliday, 1985a: 195). Halliday groups the different possible logico-semantic relationships between clause complexes into two fundamental types: (1) EXPANSION and (2) PROJECTION which are further subdivided as follows:

1. Expansion: the secondary clause expands the primary clause, by (a) elaborating it, (b) extending it or (c) enhancing it.

2. Projection: the secondary clause is projected through the primary clause, which enstates it as (a) a locution or (b) an idea. (ibid: 196)

Verbal Groups: Tense

Halliday (1985a: 175) conceives the verbal group as having two components: an experiential and a logical structure. The focus of the experiential structure is the main verb of meaning (called Event), the one lexical item of the verbal group which realises one of the various processes of the Transitivity system. In finite verbal groups, the experiential structure consists of Finite plus Event (fused in the case of one-word verbal groups) with the added option of one or more Auxiliaries. The logical structure, on the other hand, is what carries the tense system and "most of the semantic load" (ibid).

Nominal Groups: Modification

Halliday's taxonomy of nominal groups (1985a: 159) involves the categories of Deictic, Post-Deictic, Numerative, Epithet, Classifier, Thing, and Qualifier. Deictic elements (D) are either specific and include demonstratives (this/that etc.) and possessives (my, John's etc.), or non-specific (each, a, some etc.), whereas a Post-Deictic element (D2) is "one which adds further to the identification of the sub-set in question ... by referring to its fame or familiarity, its status in the text, or its similarity/dissimilarity to some other designated subset" (Halliday, 1985a: 162) such as same, entire, aforementioned, odd, normal, special, and well-known.
Numeratives (N) incorporate number in some way either cardinal or ordinal (e.g. two and second), exact or inexact (e.g. ten and many). Epithets (E) signify “some quality of the subset, e.g. old, long, blue, fast” and “may be an objective property of the thing itself; or it may be an expression of the speaker’s subjective attitude towards it, e.g. splendid, silly, fantastic” (ibid: 163). Classifiers (C) signify “a particular subclass of the thing in question, e.g. electric trains, passenger trains, wooden trains, toy trains” and “do not accept degrees of comparison or intensity - we cannot have a more electric train or a very electric train; and they tend to be organised in mutually exclusive and exhaustive sets - a train is either electric, steam, or diesel” (ibid: 164).

The Thing (T) is “the semantic core of the nominal group” and is either a common or proper noun or a pronoun (ibid: 167). The Qualifier (Q) is a word, phrase, or clause that is a post-modifier, i.e. it follows the Thing and is an embedded, finite or non-finite clause or an embedded phrase such as in “the plea that has been entered”, “the judgment being handed down”, and “the matter before the court” respectively (ibid: 166-7). The epithets and other modifiers (such as classifiers) in the nominal group contribute a great deal to the experiential meaning of the text while attitudinal epithets and intensifiers contribute to the interpersonal meaning (Halliday, 1985a: 169).

'Minor Processes'

Halliday (1973: 141) describes the prepositional relations or classes of circumstantial adjunct that encode experiential meaning at the level of the adverbial group as ‘Minor Processes’.

Interpersonal meanings

Halliday (1985a: 53) defines the interpersonal meaning of language as:

a form of action: the speaker or writer doing something to the listener or reader by means of language. The interpersonal function of the clause is that of exchanging roles in the rhetorical interaction: statements, questions, offers and commands together with accompanying modalities.

Interpersonal features include mood (types of speech function and modality), person, attitudinal lexis (especially modifiers and intensifiers), comment adjuncts, tone (intonation systems in spoken discourse), and what Halliday (1973: 141) calls lexical ‘register’ (i.e. expressive words and the stylistic organization of vocabulary). (See Table 3.2, above).
Attitude, Comment, Lexical ‘Register’

Modifiers and intensifiers that express the speaker’s attitude towards the subject under discussion “represent an interpersonal element in the meaning of the nominal group” (Halliday, 1985a: 163). In spoken discourse especially, attitudinal modifiers tend to be reinforced by “other features, all contributing to the same meaning: synonyms (e.g. a horrible ugly great lump), intensifiers, swear words, particular intonation contours, voice quality features and the like” (ibid: 164).

Person

Person involves the use of the distinctions made in the personal pronoun system in English which identifies first (i.e. the speaker or writer), second (i.e. the addressee, audience or reader) or third person (some-one or something else).

Modality

Modality is a grammatical resource which enables the writer or speaker to express “intermediate degrees between the positive and negative poles” (Halliday, 1985a: 86). It operates along with other interpersonal expressions of attitude and comment to express a range of meanings involving assessment of probability, usuality, obligation, inclination, and ability (Matthiessen, 1992: 421). As Halliday (1976: 197-8) puts it:

Multality is a form of participation by the speaker in the speech event. Through modality, the speaker associates with the thesis an indication of its status and validity in his own judgment; he intrudes, and takes up a position. Modality thus derives from ... the ‘interpersonal’ function of language, language as an expression of role.

Table 3.4: Modality types and values

<table>
<thead>
<tr>
<th>POLARITY</th>
<th>MODALIZATION</th>
<th>MODULATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Value</td>
<td>Probability</td>
<td>Usuality</td>
</tr>
<tr>
<td>(positive)</td>
<td>(it is)</td>
<td></td>
</tr>
<tr>
<td>high</td>
<td>certainly</td>
<td>it must be always</td>
</tr>
<tr>
<td>median</td>
<td>probably</td>
<td>it will usually</td>
</tr>
<tr>
<td>low</td>
<td>possibly</td>
<td>it may be sometimes</td>
</tr>
<tr>
<td>(negative)</td>
<td>(it isn’t)</td>
<td></td>
</tr>
</tbody>
</table>

Halliday distinguishes between epistemic and deontic modality (Palmer, 1975), calling the former modalization (i.e. the speaker’s judgment of probability and usuality) and the latter modulation (the speaker’s judgment of obligation and inclination). Three values or
degrees of modality are recognised by Halliday between the positive and negative poles; namely, high, median, and low modality.

Table 3.4 (above) is based on the system of modality as elaborated by Halliday (1985a: 334-341) and represents an overview of the types and values of modality (excluding the modulation of ability or 'potentiality' [ibid: 339] which does not share all the features of the system of modality).

It is only with the median values that the negative is transferable between the modality and the proposition as can be seen in the following examples from Halliday (1985a: 337):

<table>
<thead>
<tr>
<th>Modality Proposition</th>
<th>Modality Proposition</th>
</tr>
</thead>
<tbody>
<tr>
<td>it's likely Mary doesn't know / it isn't likely Mary knows</td>
<td></td>
</tr>
<tr>
<td>Fred usually doesn't stay / Fred doesn't usually stay</td>
<td></td>
</tr>
</tbody>
</table>

With the outer values, this does not occur. Rather, the outer values reverse (from high to low or vice-versa) when a negative is added as in the following examples (ibid):

<table>
<thead>
<tr>
<th>Modality Proposition</th>
<th>Modality Proposition</th>
</tr>
</thead>
<tbody>
<tr>
<td>it's certain Mary doesn't know / it isn't possible Mary knows</td>
<td></td>
</tr>
<tr>
<td>it's possible Mary doesn't know / it isn't certain Mary knows</td>
<td></td>
</tr>
<tr>
<td>Fred always doesn't stay (never stays) / Fred doesn't sometimes stay (doesn't ever stay)</td>
<td></td>
</tr>
<tr>
<td>Fred sometimes doesn't stay / Fred doesn't always stay</td>
<td></td>
</tr>
</tbody>
</table>

Modality can be manifested either implicitly (i.e. when it is expressed within the proposition clause itself) or explicitly (i.e. when the modal expression occurs outside the proposition clause). Implicit manifestations of modality include the modal adjuncts of probability and usuality such as probably, and usually and so on, the predicates of obligation and inclination such as required, and determined and so on, and the finite modal auxiliaries such as will, may, must and so forth (See Table 3.4 above). The explicit category involves clauses of projection or embedding and these are examples of what Halliday refers to as grammatical metaphor. They are interpersonal metaphors (or incongruent forms) of the congruent expression of modality realised within the clause. In the following example (taken from Halliday, 1985a: 333), the hypotactic clause complex I think it's going to rain, isn't it? is a metaphorical variant of the congruent form It's probably going to rain, isn't it? as can be seen from the question tag isn't it?

I think it's going to rain, isn't it?
= It's probably going to rain, isn't it?
(cf: I think it’s going to rain, don’t I?)

The I think clause is functioning as an expression of median value modality (cf. I'm sure and it’s possible). It is the speaker's opinion regarding the probability of the validity of the proposition advanced in the projected clause as the question tag clearly indicates. The proposition being advanced is an evaluation of the weather and not that I think something (question tag don’t I?). Explicit manifestations of modality include modal adjectives such as probable, likely, usual and so on; modal nouns such as likelihood, possibility etc.; and verbs such as think and believe that introduce projecting clauses of opinion and belief. Modality can also be expressed metaphorically within prepositional phrases such as in my opinion, or in all probability which represent a form that is intermediate between explicit and implicit (Halliday, 1985a: 333). Table 3.5 (below) illustrates some realisations with respect to probability.

The final distinction that is made with regard to the realisation of modality is in what Halliday refers to as Orientation: whether the orientation of the judgment is subjective (e.g. in my opinion), or objective (e.g. in all probability) as outlined in Table 3.5 below.

Table 3.5: Expressions of probability

<table>
<thead>
<tr>
<th>Category</th>
<th>Type of realisation</th>
<th>Example</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Subjective</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(a) explicit</td>
<td>I think, I’m certain</td>
<td>I think Mary knows</td>
</tr>
<tr>
<td>(b) implicit</td>
<td>will, must</td>
<td>Mary’ll know</td>
</tr>
<tr>
<td>(2) Objective</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(a) implicit</td>
<td>probably, certainly</td>
<td>Mary probably knows</td>
</tr>
<tr>
<td>(b) explicit</td>
<td>it’s likely, it’s certain</td>
<td>it’s likely Mary knows</td>
</tr>
</tbody>
</table>

(from Halliday, 1985a: 333)

Register

As Figure 3.2 (above) reveals, register in systemic functional linguistics denotes the relationship between a text and its immediate context, its context of situation. Halliday describes register as “a semantic concept ...defined as a configuration of meanings that are typically associated with a particular situational configuration of field, mode and tenor” (in Halliday and Hasan, 1985: 38-39). Thus, register is a language variety “according to use” as distinct from dialect which is a language variety “according to user” generally determined by social and geographical factors. Register is therefore “what you are speaking at the time, depending on what you are doing and the nature of the activity in which the language is functioning” (ibid: 41).
Field

The field of discourse is the feature of the context of situation which is basically what a text is about ("what is going on", ibid: 26) and is reflected in both the vocabulary and the transitivity structures utilised, i.e. through the experiential function in the semantics. Using drama as a metaphor, Halliday describes the field as "the ‘play’ - the kind of activity, as recognised in the culture, within which the language is playing some part" (ibid: 45). Martin (1986: 19), likewise, stresses the need to recognise that field encompasses both the topic being discussed as well as the actions ("or set of activity sequences oriented to some global institutional purpose") that the participants are engaged in. As regards writing, however, he suggests that the most important consideration concerning field is the need to control the degree of technicality of the text depending on the intended audience.

Tenor

The tenor of discourse is the feature of the context of situation which is concerned with the personal relationships involved ("who is taking part", Halliday and Hasan, 1985: 26) and is expressed through the interpersonal function in the semantics. Halliday has also described the tenor of discourse as "the ‘players’ - the actors, or rather the interacting roles, that are involved in the creation of the text" (ibid: 46).

Martin (1986: 29) describes tenor as social distance (in contradistinction to feedback distance for mode) and analyses tenor into three dimensions (after Poynton, 1984): status (power in Poynton’s terms) which is measured by the degree of reciprocity of linguistic choices, affect which is realised by attitudinal lexis, and contact which is realised by the range and elaboration of topic choices. Texts that have reciprocal linguistic choices, attitudinal expressions, and a wide range and elaboration of topics are described as ‘personal’ while texts that do not have these features are thought of as ‘impersonal’. Martin, thus, talks of “controlling the level of personality in a text” as an important skill that writers have to learn to develop (ibid: 30).

Mode

The mode of discourse is the feature of the context of situation which concerns “the particular part that the language is playing in the interactive process” or “the role assigned to language” and is expressed through the textual function in the semantics (Halliday and Hasan, 1985: 24-26). Halliday has also described the mode of discourse as: “the ‘parts’ - the particular functions that are assigned to language in this situation, and the rhetorical channel that is therefore allotted to it” (ibid: 46).
Martin (1992) argues that mode is oriented to both interpersonal and experiential meaning, mediating on the one hand, "the semiotic space between monologue and dialogue", and on the other "the semiotic space between action and reflection" (p. 509). It is, therefore, concerned with the degree of feedback possible between the speaker and the addressee, and also the level of abstraction of the text itself or the "degree of distance between a text and what it describes" (Martin, 1986: 24).

Academic prose tends to be highly abstract and reflective. As a consequence, it usually has a high degree of lexical density compared to spoken texts which are more complex grammatically. In addition, it displays large amounts of grammatical metaphor chiefly as nominalisations and incongruent expressions of reasoning.

**Lexical Density**

Lexical density is a measure of the degree of lexical content per clause and is calculated by counting the number of purely lexical items in each clause ignoring the function words (i.e. pronouns, auxiliaries, prepositions, conjunctions, etc.) and thereby arriving at an average figure per clause over the whole text. Embedded clauses are usually not counted as separate clauses. Halliday (1985c: 80) claims that spoken English has a typical lexical density of between 1.5 and 2 while written English is usually at least twice as dense (typically between 3 and 6 depending on the degree of formality of the writing).

**Grammatical Metaphor**

Halliday (1985a) distinguishes between congruent (or unmarked) and incongruent (or marked) realisations of meaning in grammar. The incongruent forms he refers to as grammatical metaphors. The unmarked forms are, for example, the nouns that describe people, places and things; the verbs that describe actions, thoughts and feelings; the adjectives that describe qualities; and the conjunctions that realise logical connections (Martin, 1986: 26). The language of children and beginner second language learners is largely comprised of these unmarked forms but as adults the more sophisticated, educated and prestige forms that are preferred (especially in writing) are the incongruent or metaphorical equivalents which sound "powerful and mature" (ibid: 29). Actions and qualities typically tend to become nouns (nominalisation) while logical connections are often realised as verbs or nouns. The result is "the text is distanced from the social reality to which it refers and its mode becomes more abstract" (ibid: 26).

Nominalisation is a powerful resource for creating themes and so is very important in structuring text and it is the nominal structures such as head nouns, modifiers and
qualifiers that “give the clause its enormous elasticity” (Halliday, 1985c: 75). Too much grammatical metaphor can lead, however, to lack of clarity and obfuscation.

Genre

Although Halliday (1978: 133-4) has conceived of expository, didactic, persuasive, and descriptive “rhetorical concepts” as being an aspect of mode, Hasan (in Halliday and Hasan, 1985) relates generic structure to the “Contextual Configuration” of a text in terms of the registral variables of field, tenor, and mode. She examines the elements of text structure (i.e. “a stage with some consequence in the progression of a text”, ibid: 56) to determine which elements are obligatory and which are optional, their sequence, and the possibility of their iteration for a given contextual configuration, ultimately expressing these in a formula that defines the “structure potential” of a genre, or its “generic structure potential” (ibid: 64). As Hasan puts it:

> by implication, the obligatory elements define the genre to which a text belongs; and the appearance of all these elements in a specific order corresponds to our perception of whether the text is complete or incomplete. (ibid: 61)

Hasan also relates the contextual configuration of a text to the concept of context of culture because “specific contextual configurations themselves derive their significance ultimately from their relation to the culture to which they belong” (ibid: 99).

Martin (1984, 1992) and many others (Callaghan & Rothery, 1988; Winser, 1992/3) see social purpose as an aspect of the context of culture which determines the identity of a genre “but which is expressed through register” (Littlefair, 1991: 83). Martin has defined genre as “a staged, goal-oriented, purposeful activity in which speakers engage as members of our culture” (1984: 28) and “as a staged, goal-oriented social process realised through register” (1992: 505). Thus, texts have distinctive staging (or internal sequencing) in their beginning - middle - end structure “which is the means for people achieving their goals” (Callaghan & Rothery, 1988: 25) with text structure being referred to as schematic structure in Martin’s model. Martin (1992: 507) introduces a further “communicative plane”, that of ideology, in the context of culture which “is necessary because a culture’s meaning potential is distributed unevenly across social groups and so constantly changing”. Martin defines ideology both synoptically and dynamically:

> Viewed synoptically, ideology is the system of coding orientations constituting a culture ... realised through contextually specific semantic styles associated with groups of speakers of differing generation, gender, ethnicity and class. ... Viewed dynamically, ideology is concerned with the redistribution of power - with semiotic evolution. (ibid: 507)
Kress (1989: 143) is also concerned about the social significance of genres and writes that they "are intimately tied into the social, political and cultural structures and practices of a given society, and arise as expressions of certain fundamental meanings of these structures and practices". Figure 3.2 (above) illustrates the relationship between texts and the situational and cultural contexts which determine their register and genre.

Genres may involve spoken or written language, and much work has been done by systemic linguists investigating different genres in society. For example, Ventola (1987) and Hasan (1985) having analysed the generic staging of service encounters in a variety of settings, including a doctor's surgery, a market-place, a post office, a gift shop and a travel agency. Ventola (1987: 1) defines service encounters as "systems where social processes, which realise the social activity, unfold in stages and in doing so, achieve a certain goal or purpose". She found, for example, that many of these verbal exchanges contain the following stages: an offer of service, a request for service, a transaction, and a salutation. Systemic linguistic analysis has also been utilised by Korner (1992) in the study of another professional genre, the legal interview, as outlined in the previous chapter.

Much work has also been done by systemic linguistics in Australia into written genres that are important in primary and secondary schooling across the curriculum. Hammond (1987) provides a useful overview to the genre-based approach to the teaching of writing in Australian schools. This work has chiefly been done through the disadvantaged schools program (DSP) of the New South Wales Department of Education and has produced extensive curriculum material that represents a genre-based approach to the teaching of factual writing covering the following six written genres: recounts, reports, procedures, explanations, expositions, and discussions (e.g. Callaghan & Rothery, 1988; Callaghan, 1989). These genres are described in terms of their social function, generic (schematic) structure and language features with the recount genre being summarised as follows:

**Social Function**
To retell events for the purpose of informing or entertaining. Events are usually arranged in a temporal sequence, e.g. a personal letter.

**Generic (Schematic) Structure**
- Orientation
- Events
- Re-orientation (optional element)

**Language features**
- Focus on individual participants
- Use of past tense
- Focus on a temporal sequence of events
- Use of material (or action) clauses and processes.

(Callaghan, 1989: 4)
Kamler (1993: 132) in a study of the early writing of a boy and a girl has produced a revised and fuller description of the structure of this genre as the observation genre (based on its earlier name observation comment by Martin & Rothery, 1981) which expresses the different elements in its schematic structure in Hasan’s terms (described above) as follows:

\(<\text{Orientation}>^A \text{ [Event } ^4 \text{ Description } ^4 \text{ Comment]}^B \text{ (Coda)}\)

where \(^A\) is followed by \(^4\) occur in either sequence, \(^B\) recursive, \(^0\) optional, \(\[\] \) domain of recursion or sequencing, and \(<\text{ }>\) is included in.

Maley’s (1985) study of the legal judgment genre which was elaborated in the previous chapter also adopted similar nomenclature to depict the generic or schematic structure of this genre. Martin (1986: 16) has examined a number of written genres employed by administrative officers in the CSIRO (Commonwealth Scientific Industrial and Research Organisation) as part of a series of writing workshops he conducted for its trainee staff. He discovered that they made use of “about a dozen different genres in their work” ranging from policy circulars to letters and office memos, “most of which I was encountering as a linguist for the first time”. Because of the constraints operating, he decided to teach them “a number of portable skills that they could pass from one genre to another” based on systemic work on register and genre applied to selected real CSIRO texts relevant to the participants (ibid).

Drury and Gollin (1986), Jones et al. (1989), Drury and Webb (1989, 1991a, 1991b), and Fedema (1993) have demonstrated the use of systemic functional linguistics for the analysis of student writing at tertiary level in several genres including expository or argumentative essays, and case note assignments in law (discussed in the previous chapter). Uthaipattrakoon (1989) has used the systemic functional approach to analyse university textbooks in a range of disciplines to develop EAP materials for Thai tertiary students for whom English is a foreign language.

Because of the close connection between a text and its context, Hasan (in Halliday & Hasan, 1985: 68-69) argues that:

an ability to write an excellent essay on the causes of the Second World War does not establish that one can produce a passable report on a case in a court of law. This is not because one piece of writing is inherently more difficult or demanding than the other, but because one may have more experience of that particular genre.

Hasan thus sees the need for students “to be given the experience of both talking and writing over a large range of genres” because “one learns to make texts by making texts, in much the same way as one learns to speak a language by speaking that language” (p.69).
The value of the systemic functional approach lies, then, in its ability to relate language, text, and context. As Winser (1992/3: 103) puts it:

The great strength of the systemic-functional, or register/genre-based approach, is that it provides us with a very clear and explicit statement about how exactly language is related to context. It can therefore help us take a further step on from current approaches and equip us with detailed information about those features of the language system that come into play in various situations in our culture.

3.3 Design of the present study

Systemic analyses

In order to explore the features of the genre of answering legal problem questions, a series of systemic functional analyses were performed on three different texts written by experts in the genre. These texts were written by different C165 lecturers as "model" or suggested answers to a tutorial problem question (Lecturer "S" text)\(^1\), a mid-semester assignment (Lecturer "N"), and an examination question (Lecturer "G") from the C165 course.


This study is thus motivated by the assumption that insights gained from detailed systemic analyses of student and expert texts in this genre may better inform pedagogical practice and thus improve students' ability to write and be accepted into the university discourse community. In the words of Drury and Webb (1991a: 27):

Through a detailed study of the text itself, it is possible to reveal patterns of language use at different levels from the grammar of the clause, through the register of academic style, to the structure of academic genres. Through exposure to these patterns, student learners can become empowered to begin to produce their own texts and thus play a more active and successful part in university life.

\(^1\)This is a written answer to a question that was discussed orally in the on-going tutorial program. It has, therefore, the features of written academic prose (essays and exam answers) rather than spoken discourse.
The lecturers' suggested or "model'' answers have been analysed in this study in terms of their lexicogrammar, textual organisation and structural shape. The texts' shape or schematic structure is examined to determine the generic structural potential of this type of discourse. Ideational meanings (such as transitivity patterns, tense, and lexis), interpersonal meanings (such as person, and modality), and textual meanings (such as voice, cohesion, and thematic progression) - as per Table 3.2 - are explored in detail to determine their contribution to the register of the texts through the corresponding contextual variables of field, tenor, and mode in order to delineate the significant features of the legal problem question genre and realise its communicative purposes.

A comprehensive analysis of the Lecturer “S” text (the answer to the tutorial problem question) in the above terms will be presented in chapter 4. However, in the subsequent chapters (chapter 5 - the analyses of two other lecturers' texts and chapter 6 - analyses of several student texts) for the most part, selected features only have been analysed in order to focus on those aspects which may prove problematic to learners, especially students for whom English is a second language.

Several students' texts were analysed in order to explore their attempts at writing in this genre and the extent to which their success in reproducing the features of the legal problem question answer (as explored in the chapters 4 and 5) determined their final mark. Four examination scripts which answered the lecturer “G” problem question (analysed and discussed in detail in chapter 5) were selected for detailed analysis:

1) student “A”, an Indonesian student (non-native speaker of English) who scored the lowest mark for this question (3 out of 15).
2) student “E”, a bilingual Malaysian (he was ethnically Indian and did not regard English as a second language for him) who scored more towards the middle of the range (5 out of 15)
3) student “K”, a bilingual Singaporean (ethnically Chinese and also claiming English as a first language) who scored in the middle range (7 out of 15)

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1 This student was one of a number of overseas students who were actually enrolled in the C165 course through a private business college which had a commercial arrangement with my university. These students were enrolled in a one year diploma course which comprised actual university courses (taught at the business college and monitored by university staff) as well as extra assistance with English and study skills. This diploma course was, in effect, an alternative route of entry for students into university study as it accepted students at a lower level of overall academic proficiency. Students could proceed into a full enrolment at university if they succeeded in passing all of the courses in this one year diploma. Seventeen students at this business college were enrolled in C165 in 1991, all of whom were overseas students for whom English was a second language. The performance of these students in the C165 course was, not surprisingly, far worse on average than the mainstream campus students, with 7 students failing the entire course, one pass conceded, 6 passes, and 3 passes with credit. The overall statistics for the 310 students enrolled in the course were as follows: 17.01% failed, 37.5% passed, 32.64% passed with credit, 9.38% passed with distinction, and 3.47% passed with high distinction.
4) student "J", an Australian student (native speaker of English) who achieved the highest mark in the exam for this question (13 out of 15).
TUTORIAL PROBLEM QUESTION

4.1 Lecturer "S" text

This text was written by the lecturer as a "model" for students of how to answer the following tutorial problem question:

An infant student took a lease of a flat for 12 months and undertook not to damage the flat in any way and to keep it in a tenantable condition. During a party held in the second month of occupation, considerable damage was done to the flat and the student repudiated the lease. Is he liable for the damage done and/or for the rent due prior to repudiation? Can he recover the rent he has already paid prior to the date of repudiation?

The lecturer's 986-word suggested answer to this question about the legal capacity of infants or minors to be bound by contracts is reprinted in the Appendix (see Appendix 3, p.257).

The lecturer's text was divided into conjunctively relatable units ("CRU"s), that is into "clauses which have or could have had an explicit conjunction between them" (Martin, 1985a, p.90). These clauses were analysed in terms of theme - "the point of departure of the message" - and rhyme - "the remainder of the message, the part in which the theme is developed" (Halliday, 1985a: 38). In the analysis presented in Figure 4.1 (below), the theme is in italics and the dotted lines indicate paragraph boundaries. The schematic structure of the lecturer's text is represented to the left of the text while the network of conjunctive relations is set out on the right hand side of the texts.

4.2 Schematic structure

The schematic structure refers to the characteristic stages or "beginning, middle, and end structure through which a text moves to achieve its purpose" in different genres (Jones et al., 1989: 269). As outlined previously, Howe (1990) proposes eight stages or "units of discourse" the first two of which (the Question and the Instruction) include the problem question itself. These two stages are exophoric to the answer text and involve a statement of the facts (or "Situation" in Hoey (1983)'s terms of the case (the first two sentences of the problem above) and the direction or instruction to be followed such as "Advise A on his legal position" or in this case, the two questions at the end of the problem which are really the Issues (Howe's fourth unit) to be resolved.
The lecturer's answer text is a tightly organised piece of writing which is divided into four main sections (see Figure 4.1 below):

- **Section 1**: a brief restatement of the problem question (1 para.)
- **Section 2**: a detailed discussion of the law relevant to the question (4 para's.)
- **Section 3**: an in-depth application of this law to the facts of the question (7 para's.)
- **Section 4**: a summary of conclusions in regard to the questions posed by the problem (1 para.).

The first section (one paragraph, CRUs 1&2) of the text is a restatement of the problem questions or in Howe's (1990) terms the Issue(s) to be resolved.

The four paragraphs of the second section on the relevant law proceed from the general to the specific: the first paragraph elaborates the general area of law and the general rule or legal principle involved; this is followed by the first exception to the general rule and the rule or legal principle involved; the third paragraph introduces the second exception to the general rule and the rule or legal principle involved; followed by the fourth paragraph which explores the rule (and the exception to it) established by a leading case in this area. In this section, then, we can see the third, fifth, and sixth units as proposed by Howe (1990), that is, Forecast/Overview, Statement of Law, and Authority, respectively. This section begins with a short Overview (F/O) statement (CRUs 2 & 2a), followed by an in-depth Statement of the Law as outlined above with relevant Authority cited twice (CRUS 20, and 24) in this section. Howe's fourth unit, Issue, does not occur in this section.

The seven paragraphs of the third major section on the application of the law to the facts of the question are somewhat shorter and, apart from the second, all draw conclusions as a result of systematically applying the legal rules and principles already discussed to the facts of this particular question (Howe's seventh and eighth units, Application of the Facts and Opinion, respectively). The second paragraph, on the other hand, discusses an assumption that needs to be made because insufficient information is given in the problem (Howe's fourth unit Issue) while the third paragraph makes conclusions based on that assumption (Opinion- CRU 33), as well as providing scaffolding for the rest of this section in restating the remaining questions (or Issues) to be resolved (CRUs 34 & 35).

Most importantly also, alternative possibilities or positions are considered in this section: firstly, in connection with the issue of whether the "infant student" is in fact still a student when he repudiates the contract (the second paragraph); and secondly, with the issue of the student's liability for the unpaid rent and the damages to the flat (the last two
I am asked to advise the infant student as to whether:

1. (Q1) he is liable for the damage done
   or the rent due prior to his repudiation of the lease, and

2. (Q2) he can recover back the rent he has already paid.

In order to advise the infant it is necessary to consider the law relating to the contractual capacity of infants.

Infants are one group of persons whom the law regards as lacking full contractual capacity.

The general rule is that any contract made by an infant is unenforceable against the infant.

The purpose of the rule is to protect infants from exploitation by allowing them to escape legal liability under any contract they may enter into.

But contracts with infants are not null and void.

They are simply unenforceable against the infant.

Thus, if the contract is performed,

anything done under it will be recognized by the courts as having been legally done.

There is an exception to the general rule in the case of contracts of necessary goods and services and/or beneficial contracts of service.
Such contracts are enforceable by and against the infant, although the infant need only pay a "reasonable" price regardless of what the contract price was. In addition to these contracts there is a second class of contracts which are not simply unenforceable against the infant, no matter what.

This second class of contracts is more difficult to define. Most of the cases have concerned contracts to lease or purchase land or to purchase shares. However it has also been held that a contract under which an infant joins a partnership and marriage settlement contracts are in this category. All such contracts impose continuing obligations and confer continuing rights upon the parties to the contract. As such the rule is that these contracts are voidable at the election of the infant. But if he does not elect to avoid the contract during his minority (or within a reasonable time of his attaining 18 years) then his right to avoid the contract will be lost and, as an adult, he will be held to the contract and to obligations arising in the future.
If the infant elects to avoid a voidable contract during his infancy or within a "reasonable time" of attaining 18 years, then it has been held that he cannot be made liable for any obligations that would have arisen after the date of repudiation.

However, in the famous case of Steinberg v. Scala, it was also established that, if the infant had obtained some benefit under the contract, he cannot recover back money already paid.

This is because the contract was perfectly valid at the time it was entered into and thus money paid under it was lawfully the property of the payee.

The only exception to this rule being where there is a "total failure of consideration" so that the infant gets nothing of what he was entitled to expect under the contract.

In Steinberg v. Scala it was said that because the infant had become the legal owner of the shares, even though no dividends were ever paid on them, there had not been a total failure of consideration.

The infant got exactly what she had contracted for.

In this case the infant has been in occupation of the flat for two months when he repudiates the contract.
Thus there is no total failure of consideration in this case.

I assume that the "infant student" is still an infant when he repudiates.

If he is not

there may be a question as to whether he can still lawfully repudiate the contract.

Has he acted within a reasonable time of reaching 18?

I need further information on this point.

On the assumption that the right to repudiate has not been lost,

it is clear that all future obligations which would otherwise have arisen under the lease are now discharged.

Thus the infant is not liable for rent due in the future.

But what about rent due but unpaid at the date of repudiation?

Also can he recover back rent already paid?

On the authority of Steinberg's case, it is clear that he cannot recover back the rent already paid since this is not a case in which there has been a total failure of consideration.

On the other hand, the position with rent due but unpaid is more difficult.
**But the better view** seems to be that because contracts which are voidable at the election of the infant are in fact binding on the infant, until he repudiates, then any obligation accrued but unsatisfied as at the date of repudiation will have to be honoured.

On this view the infant would not only have to pay the arrears of rent, he would also be liable for damage caused -

as that would be an obligation imposed on him by the contract.

On the other hand, if the effects of the infant's repudiation is to "rescind" the contract (as was said in Steinberg v. Scala) there would not be a contract left after repudiation on which the infant would be sued - and thus he would escape liability for the rent unpaid and for the cost of the necessary repairs.

Although the master is unclear, my view is that the infant should be liable for the arrears of rent and the cost of the repairs.

Any other result would be most unjust.

In summary therefore, my advice to the infant is:

(a) You cannot recover back the rent already paid

because there has not been a total failure of consideration in this case.

You have had the use of the flat for at least two months.

(b) It is not certain that you will be liable for arrears of rent or for the cost of repairs - but the likelihood is that you will be liable for both.

**In summary therefore**
paraphrased). Furthermore, two of the conclusions reached (CRUs 36, and 41-42) are backed up by explicit reference to case authority (Howe's sixth unit, Authority). The last section of the text (CRU 45) is a summary or restatement of the final conclusions reached (Opinion).

While later lecturers on the C165 course have disagreed with aspects of this "model" answer, such as the inappropriacy of restating the question asked (as is done in section 1)\(^1\) and even the concept of a "model" answer itself, they are all agreed on the need to organise answers in a systematic and logical way which addresses the issues raised by the problem by applying the relevant legal principles or propositions backed up by appropriate case authorities.

It is clear then that the schematic structure adopted by the lecturer in this "model" answer is appropriate to the genre following closely the structuring outlined by Gaskill (1987) and the discourse units outlined by Howe (1990) in chapter 2. The first section states the problem or issues to be resolved; the second section systematically outlines the relevant legal propositions and cites authority for those propositions (at least the most relevant case on which this problem question essentially turns); the third section applies those propositions and incorporates "the second element of legal reasoning", "the dialectic nature of law", in discussing alternative viewpoints and makes conclusions backed up by reasons as to the likely outcome of the problem.

4.3 Textual features

Cohesion

Halliday and Hasan (1976) demonstrated that texts achieve cohesion through a number of systems including reference, conjunction, and lexical cohesion which contribute meaning within and beyond the sentence level through the textual metafunction. The following section explores the cohesive patterns in the lecturer's text and the part that reference, conjunction, and lexical cohesion play in characterising the legal problem question genre.

Reference

An analysis (see Figure 4.2 below) was done of the reference chains (after Halliday & Hasan, 1976; Halliday, 1985a; Martin and Peters, 1985; Martin, 1992) that contribute to

\(^1\)Krever (1989: 48) agrees: "Repeating the question is a common technique often used by students to gain a breathing moment as they begin an answer and to help organise their thoughts. There are no marks to be found in repeating the question. It can be a harmful practice. It often alerts the person marking the paper to an answer that is using filler instead of substance."
the cohesion of the lecturer’s text. There is extensive use of pronominal or personal reference in this text. This is a feature which has been cited as more characteristic of narrative than exposition in which shorter non-human chains tend to predominate (Martin and Peters, 1985). The chains which link the people in the text are usually very long, running most of the length of the text. For example, the author of the text appears in the first (Problem/Issue), third (Application of Law to the Problem Facts) and fourth (Summary/Conclusions) sections of the text, i.e. in CRUs 1, 28, 31, (all as I) and at the end of the text in units 43a, and 45 (as my). Similarly, the infant student of the problem question appears in these three sections except for one appearance as the first unit of the second (Relevant Law) section, unit 2 as the infant. The student in question is usually in the third person as he or his or the infant, but changes to the second person you in the final section (Summary/Conclusions), so that the advice to the infant is in the form of the actual words the solicitor might speak to his/her client in giving his/her professional advice.

These changes of person are certainly one of the distinctive features of this text (see discussion below under Interpersonal features) where the orientation changes to speaking to the reader/marker when stating the assumptions necessary (units 28, 31), and conclusions reached (units 43a, 45), in “mock advice” to the client.

Other long and noteworthy chains appear mostly in the second section (Relevant Law) which involves legal propositions with reference to the contractual capacity of infants in general. These references are all in the third person but include both singular and plural: he (CRUs 17, 18, 19a, 20, 23a, 38), his (units 17, 17a, 19), and them, they (unit 5a) in the case of personal reference; an infant (unit 14), the infant (CRUs 4, 7, 10, 10a, 11, 16a, 19, 20, 23a, 38), and the parties (unit 15a) in the case of demonstrative reference. This changing from singular to plural and the use of the so-called generic or universal “the” (for infants in general) as opposed to the anaphoric “the” (for the actual infant in the problem question) could pose comprehension problems to some readers, especially second language learners. A short chain referring to the specific infant in the Steinberg v Scala case (the infant, she) in units 24 and 25 contributes to the potential confusion.

There are a number of shorter chains referring to contracts in the second section (Relevant Law): any infant contract (units 5a, 6, 7, 8), contracts of necessary goods and services (units 9, 10, 10a, 11), the second class of voidable contracts (CRUs 11, 12, 13, 14, 15, 15a, 16a, 17, 17a, 18), and the contract in the Steinberg v Scala case (units 20, 21, 21, 22, 23a). Noteworthy is the use of any and such in these sections. Danet (1985) and Charrow et al. (1982) point to their more frequent occurrence in legal
Figure 4.2: Reference Chains

1. the infant student
2. his repudiation
3. the infant
4. the law
5. the purpose of the rule
6. the general rule (unit 4)
7. the infant
8. infants
9. the purpose of the rule
10. contracts
11. the contract
12. contracts of necessary goods etc.
13. the contract price
14. a "reasonable" price
15. these contracts
16. a second class of
17. more difficult
18. this second class
19. most of the
20. contracts to
21. shares etc.
22. an infant
23. a contract re: partnership & marriage
24. this category
25. all such contracts
26. impose continuing obligations etc.
27. the parties
28. the contract as such

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contexts as a style marker of legal discourse. There are three occurrences (units 10, 15, 16) of *such* as a cohesive device (a comparative referent according to Halliday, 1985: 295) in the whole text while *any* (though not deictic) occurs five times.

In the Application of Law section and the Summary, there are a number of reference claims of varying lengths to do with, for example, this particular case (units 26, 27, 36a, 43, 45), the contract in this case (units 26a, 29a, 32, 40a, 41), the unpaid rent, and the cost of repairs.

The demonstrative *this* is an important cohesive device in the whole text being utilised a total of ten times (CRUs 12, 14, 21, 23, 26, 27, 31, 36a, 39, 45). There are also two uses of *these* (units 11, 16a) and one of *that* (unit 40a). These demonstratives are frequently in thematic position in the clause and play a vital linking role both within and between paragraphs as well as between larger sections of the text, i.e. in the schematic structure.

For example, in unit 11 the marked theme *In addition to these contracts* links to the preceding discussion of the paragraph while realising a point of departure for the final sentence which forms a bridge to the following paragraph. The theme of unit 12 *This second class of contracts* links back to the rheme of unit 11 by way of both lexical repetition (See discussion of lexical cohesion below) and the referent *this*. It is also the point of departure for the next two paragraphs of the text.

Likewise, the marked thematic adjunct *In this case* (unit 26) begins the third section of applying the relevant law to the facts of the problem and links back to the first section, the problem/issue to be resolved, in contradistinction to the general discussion of the relevant law and cases of the previous section. It is an extremely important signal but as Drury and Gollin (1986: 217) note, ESL students "are often unaware of the summarizing function of reference items such as ‘this’ and how they can begin and end stages in the schematic structure”.

**Conjunction**

As stated earlier, the lecturer’s text was divided into conjunctively related units, that is into “clauses which have or could have had an explicit conjunction between them” (Martin, 1985a: 90). The network of conjunctive relations that pertain either explicitly or implicitly between the conjunctively related units makes up the right hand column accompanying the text (See Figure 4.1 above). I have also attempted to subclassify conjunction into external or internal conjunction, i.e. according to whether it “relates propositions about the real world to each other” or whether it “relates speech acts to each
other, making connections in what might be termed the rhetorical world of discourse”, respectively (Martin, 1985a: 90). The distinction, however, is not always clear-cut in a number of cases and while the subclassification presented here is sometimes arguable, the criteria advocated by Martin (1992: 226-230) such as the paraphrase test\(^1\) have been utilised in borderline cases. In general, hypotactic relations typically realise external conjunction while paratactic or “cohesive” relations typically realise internal conjunction. Note that relative, projected, and embedded clauses and clauses functioning as complement are not considered as separate units in this analysis.

Martin’s notational conventions have been adopted in my analyses whereby relations are marked as either implicit (imp) or explicit (exp) and classified using the abbreviations given in Table 3.3 (p. 51). Furthermore, the conjunctive expressions in the text realising the logico-semantic relations appear in italics to the right of the reticulum with implicit conjunction indicated by brackets.

**Figure 4.1** (above) reveals that six implicit conjunctive links have been incorporated into the conjunction analysis out of a total of 43. Although Halliday (1985a: 308) warns that including implicit conjunction may lead “to a great deal of indeterminacy, both as regards whether a conjunctive relation is present or not and as regards which particular kind of relationship it is”, Martin argues that it is difficult to interpret some texts “unless implicitly realised connections are made” (Martin, 1992: 183). Following Martin, because implicit additive and implicit internal relations (“with the exception of internal comparison …which is often unmarked but crucial to an interpretation of the generic organisation of text”, ibid: 184) are problematic in that it is possible to insert them very freely in a great many texts, these types of links have generally not been considered.

My analysis reveals a roughly equal mixture of both internal and external conjunction (21 classified as internal and 17 as external, and 5 “and”’s). A variety of types of conjunction is also evident but the consequential category of logico-semantic relations is clearly dominant (a total of 22 out of 43), especially consequence (a total of 12), condition (a total of 5), and concession (a total of 3). The comparative category is next in importance (a total of 11), mostly realised as contrast conjunction (a total of 7), followed by the additive (2 internal and 5 “and”’s), and temporal conjunctive categories (2 simultaneous and 1 successive).

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\(^1\) Martin (ibid: 226) claims that “The best test for determining the appropriate reading is to change the dependency relationship between the messages in question (from hypotactic to paratactic or “cohesive” or vice versa); with internal relations this will commonly involve projecting one of the related messages with a verbal process”.  

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According to Martin and Peters (1985: 62), expository prose typically contains a mixture of both internal and external conjunction in a variety of logicosemantic categories including consequential and comparative. In contrast, narrative tends to have external conjunctive relations which are generally dominated by temporal conjunction, especially successives. This text then clearly exhibits patterns of conjunctive relation described as typical of expository prose.

Another feature of expository texts is the use of internal conjunction to organise the rhetorical structure of the argument or “to scaffold the schematic structure of the text” (Martin, 1992: 181). In this text, internal conjunction is apparent particularly at paragraph boundaries and forms a fairly strong scaffolding for the development of the discourse.

For example after a brief restatement of the problem question (unit 1), the internal purposive conjunction in order to (unit 2) leads on (and is linked back to the first section by lexical cohesion) to open the second section of the text, discussion of the relevant law to the problem. Throughout the second section of the text, we are concerned with general rules or statements of law and their exceptions or modifications. In this section, there are five examples of contrast conjunctions which follow on from a preceding statement (or set of statements) regarding the law (i.e. CRUs 6, 9, 14, 17, 20).

Another fundamental feature of this text is the consideration of the consequences of legal rules and the making of conclusions based on consideration of the rules and the facts of the problem. Thus, a recurring conjunctive pattern particularly in the third section - the application of the law to the facts of the problem - is a statement of fact or opinion followed by a conclusion realised through an internal consequence conjunction, typically thus. Examples include units 8 and 22 in the second section, units 27, 31, 33, 36a, 42 in the third section, and unit 45, the last section.

Other internal conjunctives (contrast, concession, addition) are important in the organisation of the discussion in the third section of the text. The rhetorical questions which restate the issues to be resolved in units 34 and 35 utilise internal contrast and addition, respectively. Contrast is significant in the third section which attempts to answer the three separate questions posed as per section one. Alternative perspectives and outcomes for the most difficult question are examined in the last two paragraphs of this section, each being introduced by the internal contrast conjunction on the other hand (units 37 & 41). Concessives (units 38 & 43) relate to the acknowledgement of the uncertainty of the outcome.
The successive conjunctive expression *in summary* begins the final section of the text, which of course is a summary of the conclusions arrived at. Although there is little use throughout the text of the "logical development by exemplification" pattern that is described as "particularly typical of prestigious expository writing" (Martin and Peters, 1985: 81), it is clear from the preceding discussion that internal conjunction in general has been used extensively to realise the schematic structure of the text.

There are, however, a number of cases where various grammatical metaphors or incongruent realisations (after Halliday, 1985a: 321) of conjunctives have been preferred in the text and cohesion has been effected by referential and lexical means. These will be explored later in the discussion on Mode.

The dominance of consequential relations, it would seem, is a distinctive feature of this genre because of the nature of legal reasoning. In answering legal problem questions, one has to have authorities for propositions that are applied to the facts of the question and to present "a reasoned evaluation of the merits of the arguments" (Krever, 1989: 52). Most of these relations are to be found in the third and fourth sections of the text, that is in applying the law to the facts and in the concluding summary. Consequence conjunctions are thus used in giving reasons for or consequences of a legal rule or proposition and in justifying the conclusions reached in respect of the problem at hand.

Danet (1985) demonstrated that a high incidence of complex conditionals was a feature of some legal documents. It is notable that in this text there are 5 conditionals (and a further one embedded in unit 24) which would suggest that this may also be a typical feature of this genre because conditionals of the "if... then ..." variety (which nearly all the ones in this text are) are clearly an important feature of logical reasoning. The reasonably high incidence of both contrast and concessive conjunction, similarly, does not seem surprising given the nature of legal reasoning and the "dialectic nature of law" such that students are expected to "recognise the relative strengths and weaknesses of the opposing arguments" (Krever, 1989: 52) and argue a particular interpretation in the light of all the competing alternatives.

Contrast, condition, and concessive conjunctions, then, would also appear to be typical of legal reasoning in that they relate to the dialectics of the legal process. Different cases or points of view are compared and the differences highlighted; alternative arguments and possibilities, and contrastive perspectives necessarily have to be considered and evaluated in the process of reaching a final judgment.
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<td>escape</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>repudiation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>42</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>liability</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>repudiation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>43</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>matter</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>repudiation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>43a</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>liable</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>repudiation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>44</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>result unjust</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>repudiation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>45</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>cannot</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>repudiation</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Lexical Cohesion

There is a great deal of lexical repetition apparent in this text. An analysis of the lexical strings (see Figure 4.3 above) was conducted in terms of the following categories: Legal Judgments; Legal Documents; Legal Obligation / Rights; Certainty / Uncertainty; People; Goods, Property, Services; Money; Time; Legal Status; Legal Action; Legal Opinion. While there are some examples of synonymy, and collocation (discussed below), the predominant device of lexical cohesion is clearly repetition, probably because of the technical nature of the discussion and the requirement in the law for precision in terms of legal classification and definition. For example, contract appears 27 times, infant occurs 29 times, rent is found 12 times, while repudiation, total failure of consideration, and reasonable occur 9, 5, and 4 times, respectively. This is surely because there are no adequate synonyms for many of these legal terms.

Lexical repetition is evident in creating cohesion within and between many paragraphs in this text. Repetition of the phrase to advise the student is used between the first and the second paragraphs (which also comprise the first two sections of the text), repetition of the general rule helps create texture between the first two paragraphs of section two (in units 4 and 9), repetition of second class of contracts between the next two paragraphs (units 11 and 12), and repetition of the whole of unit 17 in the positive in unit 19 links the last two paragraphs of the second section. Similarly, repetition of repudiates (in units 19a and 26a) and total failure of consideration ( in units 23 and 24 and 27) contributes cohesively between the second and third sections of the text. The restatement of the second and third issues of the problem question in units 34 and 35 leads on to the next two paragraphs of the third section achieving cohesion via repetition of recover back the rent already paid in unit 36 and rent due but unpaid in unit 37.

Thematic Progression

In the analysis presented in Figure 4.1, theme has been italicised and subordinate adverbial clauses (e.g. CRUs 1, 5a, 10a, 23a, 26a, 28a, 36a, 40a) have been ignored except where they are thematic (e.g. units 8, 16, 17, 19, 29, 32, 41, 43). Independent clauses with subject ellipsis (e.g. unit 15a) and projected, relative and embedded clauses have also been excluded. The discussion below will largely ignore Textual Theme which has been dealt with already in the discussion on Conjunction. (See Martin, 1985a: 94-95).

Figure 4.4 (below) maps the thematic progression of the lecturer's text to illustrate the patterns of thematic continuity in the text. This analysis reveals that the text has very
Figure 4.4: Thematic Progression (Lect'r "S")

1
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RESTATEMENT OF PROBLEM Q

SECTION 1

RELEVANT LAW

SECTION 2

APPLICATION OF LAW TO FACTS OF PROBLEM

SECTION 3

APPLICATION OF LAW TO FACTS

SECTION 4

SUMMARY
little jerkiness due to unlinked new themes. On the contrary, it is a carefully developed text that freely uses the range of thematic patterns described previously in chapter 3.

There is extensive use of “chaining” (e.g. units 2-6, 13-17, 38-40, 41-44), some “looping” (e.g. units 6-7, 10-11, 12-13, 17-18), and considerable “leapfrogging” (e.g. units 1-28-31, 13-20-24) and “radiating” patterns from both preceding themes (e.g. units 6-7&8, 24-26&36) and also from preceding rhemes (e.g. units 16-17&19, 20-21&22&23, 28-29&30&32&33, 33-34&35, 43-44&45).

Some of these are worthy of comment before examining the thematic content in detail. The largest “leaps” (1-28-31) occurred for the personal pronoun “I” which would not cause any comprehension difficulties. The largest thematic “radiating” pattern (24-26&36) which was linked via “leapfrogging” (13-20-24) and “looping” (12-13) to the discussion of the whole class of “voidable” contracts concerned the leading relevant case of Steinberg v. Scala and thus bridged Section 2 (Relevant Law) and Section 3 (Application of the Law to the Facts of the Problem). The largest thematic “radiating” pattern (28-29&30&32&33) concerns the discussion on the assumptions necessary because of insufficient information being given in the problem question. This forms a discrete sub-section within the detailed discussion of the third section.

There are four types of Topical Theme apparent in this text. The first type is the group of 8 Themes that deal with contracts (CRUs 6, 7, 8, 10, 11, 12, 15, and 22) and which are mostly linked by the “looping” pattern. It is significant that these Themes are all unmarked (except for the subordinate clause theme in unit 8) and occur only in the second section of the text, the Relevant Law, the section that discusses in depth the law relating to infant contracts. In fact, the first Theme of this group is contracts with infants at unit 6. So there is thus a close connection between Topical Theme and Schematic Structure in the second section.

The second type of Topical Theme deals with people. These Themes occur throughout the entire four sections of the text, (See also the discussion above on personal reference chains and lexical strings), and are all unmarked except for the Theme in unit 2 In order to advise the infant which marks the beginning of the second section. Marked Theme is being used here to highlight the Schematic Structure, to mark the progress from section one to section two. The extensive human Themes (19 units including first [3 I s, and 1 my ], second [3 you s], and third persons) are not a normal feature of expository texts but more characteristic of narratives:

> Casual conversation and narrative for example, both favour the selection of human Themes, with first and second person Themes predominating in many contexts. (Martin & Peters, 1985: 80)
This similarity with narrative in the use of human Themes would appear to be another distinctive feature of the legal problem genre.

The third group of Themes concerns legal rules/propositions and authoritative cases, and not surprisingly occurs almost entirely in the second section of the text, the Relevant Law. There are seven Themes (units 4, 5, 13, 20, 23, 24, 36) in this group and the most notable feature is that the three Themes that refer to the authoritative case of Steinberg v. Scala are all marked Themes (units 20, 24, and 36), i.e. they are not the grammatical Subjects. Thus, Thematic progression is reinforcing the Schematic Structure of the text in this section also and in particular the leading case of Steinberg v. Scala has been highlighted by the use of thematic prominence.

The final group of Themes relates to the legal position in the present case and similarly, occurs in the corresponding part of the text, the third section Application of Law to the Facts of the Problem. There are 8 Themes in this group (CRUs 26, 32, 37, 38, 39, 41, 43, 44), with all except 37, 38 and 44 being marked. The first Theme In this case (unit 26) marks the commencement of the third section of the text and text structure and cohesiveness is achieved by a combination of reference (see discussion above) and parallelism with the marked Theme in unit 24 In Steinberg v. Scala. The 8 themes in this group include the following noun phrases: this case, the right to repudiate, the position, the better view, this view, the effect of ... repudiation, the matter, any other result. Five of these also mark paragraph boundaries in this seven paragraph section confirming Martin’s observation (1985a: 97):

In principle, in exposition paragraphs tend to reflect the schematic structure of a text. Boundaries between paragraphs are thus realized through an interaction of conjunction, lexical cohesion, and theme.

Clearly, the progression of the Theme in this section is also closely connected with and helps to realize the Schematic Structure of the text.

It is worth noting as well that the final section utilizes Textual Theme, the conjunctives In summary and therefore to mark the final paragraph and section boundary (Summary of Conclusions) and realize the text’s Schematic Structure.

**Voice**

In the lecturer’s text (ignoring downranked passives), there are 16 conjunctively related units (units 1, 8, 8a, 14, 17a, 18, 19a, 20, 21a, 23a, 24, 29, 32, 38, 41a, 41b) that contain at least one passive verbal group out of a total of 62 CRU’s. In virtually all of these, the agent has been left out which indicates that the focus is on the event or ideas.
under discussion and not the person or agent responsible for causing the event or proposing the idea.

In units 8 and 8a, the choice of passive voice enables the focus to remain on the infant contract itself and its performance rather than on the individual infant involved because we are concerned with enunciating the general rules regarding infant contracts. Thematic continuity ("what I'm telling you about") and therefore the development of the text has been achieved in CRUs 6, 7, and 8 by the continued choice of subject position and unmarked theme for infant contracts and the omission of the agent in unit 8. The whole of unit 8 is a marked theme for the following main clause (unit 8a) and thus the text develops the legal consequences from the point of departure of the performance of an infant contract. Subject position (and unmarked theme at the level of this clause) for the actions that have flowed from the performance of the contract (anything done under it) has been enabled by the choice of passive voice in unit 8a which clarifies what the legal status of these contracts is (i.e. what the courts will recognize).

The majority of the passives occur in the second section on the relevant law and like unit 8a just discussed above, most involve an elaboration of the legal status of the various types of infant contract, i.e. what the law is or what has been decided by the courts. Agency, then, is clearly not important (i.e. the judge or court which made the decision) but rather the focus is on the principles of law that were decided in the relevant particular cases. So in units 8a, 14, 19a, 20, 24, (and unit 41a in the third section), the focus is on what has been recognized, held, established, or said in court cases on infant contracts. In units 20 and 24, the important relevant case of Steinberg v Scala is cited by name and is in marked thematic position (i.e. the point of departure: "I'm telling you about the Steinberg v Scala case").

Most of the remaining passives involve discussion of the rights and obligations of the infant and occur equally in both the second and third sections (the rights and obligations of infants in general as well as those of the infant in this problem) in units 17a, 18, 23a, 32, 38, and 41b. Agency is also not a concern here but rather the infant's legal position, i.e. the matter of whether the infant will be held to the contract (unit 18), was entitled to something (unit 23a), or could still be sued (unit 41b); whether the infant's rights have been lost (units 17a, 32); or whether the infant's obligations have been discharged (unit 32) or will have to be honoured (unit 38). Passive voice is necessary in all the above cases in order make the infant and his rights and obligations the grammatical subject.

So, in this text the option of passive voice is important in the development of the text in focussing on the relevant law (i.e. on the legal principles that have been decided), and
on the legal rights and obligations of both infants in general and the infant in the problem in particular.

Deixis (Nominal Groups)

The analysis (see Figure 4.5 below) of the nominal groups in the “S” text revealed a striking number of Qualifiers, i.e. modifying elements that come after the noun-head (T) which are either finite or non-finite embedded clauses or embedded phrases (Halliday, 1985a: 166-167). Concomitantly, a great degree of esphoric reference (“forward reference within the nominal group” - Martin, 1992: 123) occurs in this text because as Halliday and Hasan (1976: 72-73) observe, the definite article within a nominal group points forward to the modifying elements in the group which is typically the Qualifier. As Martin (ibid: 123) suggests, esphora is a very common way of presenting new information or participants to the text as opposed to the other phoric function of the definite article which is to refer to known or presumed information either inside or outside the text.

**Figure 4.5: Nominal Groups**

| D = Deictic | D2 = Post-Deictic | [ ] embedded phrase.grp |
| N = Numerative | E = Epithet | [ ] embedded clause |
| C = Classifier | T = Thing | Q = Qualifier | (finite or non-finite) |

1.  
   \[ D \ C1 \ T \ D \ T \ Q[ ] \]  
   the infant student the damage done

2.  
   \[ D \ T \ Q[ ] \ D \ C1 \ T \ Q[ ] \ ]  
   the rent due prior to his repudiation of the lease the rent he has already paid.

2a.  
   \[ D \ T \ Q[ ] \ ]  
   the infant.

3.  
   \[ N \ T \ Q[ T ] \ Q[ E \ C1 \ T ] \ ]  
   the law relating to the contractual capacity of infants.

3a.  
   \[ N \ T \ Q[ ] \ ]  
   one group of persons whom ...full contractual capacity.

4.  
   \[ D \ D2 \ T \ D \ T \ D \ T \ ]  
   The general rule any contract the infant.

5.  
   \[ D \ T \ Q[ D \ T ] \ ]  
   The purpose of the rule.

5a.  
   \[ C1 \ T \ Q[ D \ T \ Q[ ] \ ] \ ]  
   legal liability under any contract they may enter into.

6.  
   \[ T \ Q[ ] \ ]  
   contracts with infants.

7.  
   \[ D \ T \ ]  
   the infant.
8. the contract

8a. anything done under it

9. an exception to the general rule

9a. the case of contracts of necessary goods and services and/or beneficial contracts of service.

10. Such contracts

10a. the infant

11. these contracts

11a. a second class of contracts which ... against the infant.

12. This second class of contracts.

13. Most of the cases

13a. contracts to lease or purchase land or purchase shares in a company.

14. a contract under which an infant joins a partnership and marriage settlement contracts

15. continuing obligations

15a. continuing rights upon the parties to the contract.

16. the rule these contracts...at the election of the infant.

17. the contract his minority a reasonable time of his attaining 18 years

17a. the infant a voidable contract his infancy a "reasonable" time

18. an adult the contract obligations arising in the future

19. the infant a voidable contract his infancy

19a. a reasonable time of attaining 18 years

any obligations that... the date of repudiation.
the famous case of *Steinberg v. Scala* the infant

some benefit under the contract money already paid.

the contract the time it was entered into

money paid under it the property of the payee.

the only exception to this rule "a total failure of consideration"

the infant the contract

the infant the legal owner of the shares no dividends

a total failure of consideration.

The infant

this case the infant occupation of the flat for two months

the contract

no total failure of consideration in this case.

the "infant student" an infant

a question the contract

a reasonable time of reaching 18

further information on this point

the assumption that the right to repudiate.....lost

all future obligations which...under the lease the infant rent due in the future

rent due but unpaid at the date of repudiation

rent already paid

the authority of Steinberg’s case the rent already paid
a case in which...a total failure of consideration

the position with rent due but unpaid

the better view contracts which...the election of the infant the infant

any obligations accrued but unsatisfied as at the date of repudiation

this view the infant the arrears of rent

damage caused

an obligation imposed on him by the contract

the effect of the infant's repudiation the contract

a contract left after repudiation on which the infant...sued

liability for the rent unpaid and for the cost of the necessary repairs

the matter

my view the infant the arrears of rent and the cost of the repairs

Any other result.

my advice to the infant the rent already paid a total failure of consideration

this case the use of the flat for at least two months

arrears of rent the cost of repairs the likelihood

There were a total of 34 embedded clauses in the text, 11 finite and 23 non-finite. Ten non-finite embedded clauses were to do with money or rent, e.g. money paid under it (unit 22), or rent already paid (unit 35). Six embedded clauses concerned contracts (4 finite, and 2 non-finite), e.g. contract under which an infant joins a partnership etc. (unit 14); five qualifiers concerned obligations (2 finite, and 3 non-finite), e.g. obligation accrued but unsatisfied as at the date of repudiation (unit 38); and four qualifiers involved time (1 finite, 3 non-finite), e.g. time of his attaining 18 years.
This propensity for embedding and often multiple embedding, especially in statutes and formal documents, is certainly a characteristic feature of legal language as the literature cited earlier attests, and contributes to comprehension difficulties. This degree of qualification is generally attributed to the need for precision in law. People, things, situations, events, conditions etc. have to be described and defined so that there is no ambiguity as to who or what is being referred to. The upshot in legislative terms is, as discussed previously, often extremely long and complex sentences with exhaustive all-inclusive lists and cross-qualifications. Long clause complexes with embedded clauses occur in unit 20 (embedded conditional clause), unit 24 (embedded consequential and concessional clauses), unit 38 (embedded consequential and successive clauses), and unit 45 (embedded consequential clause). This embedding is another feature that contributes to defining the text as belonging to the legal register.

Collocation

Table 4.1: Material & Relational Processes (Process/Medium)

<table>
<thead>
<tr>
<th>Process</th>
<th>Medium</th>
<th>CRU</th>
<th>Process</th>
<th>Medium</th>
<th>CRU</th>
</tr>
</thead>
<tbody>
<tr>
<td>recover</td>
<td>rent (Units 1, 35, 36, 45)</td>
<td></td>
<td>enter into</td>
<td>contract</td>
<td>(5a, 21)</td>
</tr>
<tr>
<td>perform</td>
<td>contract</td>
<td>(8)</td>
<td>get</td>
<td>nothing...</td>
<td>(23a)</td>
</tr>
<tr>
<td>pay</td>
<td>price</td>
<td>(10b)</td>
<td>pay</td>
<td>dividends</td>
<td>(24)</td>
</tr>
<tr>
<td>impose</td>
<td>obligations</td>
<td>(15, 40a)</td>
<td>get</td>
<td>what... contracted for</td>
<td>(25)</td>
</tr>
<tr>
<td>confer</td>
<td>rights</td>
<td>(15a)</td>
<td>repudiate</td>
<td>contract</td>
<td>(26a, 29b)</td>
</tr>
<tr>
<td>avoid</td>
<td>contract</td>
<td>(17, 17a, 19)</td>
<td>act</td>
<td>student</td>
<td>(3/4)</td>
</tr>
<tr>
<td>lose</td>
<td>right</td>
<td>(17a, 32)</td>
<td>honour</td>
<td>obligations</td>
<td>(38)</td>
</tr>
<tr>
<td>hold to</td>
<td>contract</td>
<td>(18)</td>
<td>pay</td>
<td>arrears of rent</td>
<td>(39)</td>
</tr>
<tr>
<td>obtain</td>
<td>benefit</td>
<td>(20)</td>
<td>escape</td>
<td>liability</td>
<td>(5a, 41, 42)</td>
</tr>
<tr>
<td>recover</td>
<td>money</td>
<td>(20)</td>
<td>have</td>
<td>use of</td>
<td>(45b)</td>
</tr>
<tr>
<td>do</td>
<td>damage</td>
<td>(1)</td>
<td>pay</td>
<td>rent</td>
<td>(1, 35, 36, 45)</td>
</tr>
<tr>
<td>make</td>
<td>contract</td>
<td>(4)</td>
<td>protect</td>
<td>infants</td>
<td>(5)</td>
</tr>
<tr>
<td>do</td>
<td>anything</td>
<td>(8a)</td>
<td>lease</td>
<td>land</td>
<td>(13)</td>
</tr>
<tr>
<td>purchase</td>
<td>shares</td>
<td>(13)</td>
<td>join</td>
<td>partnership</td>
<td>(14)</td>
</tr>
<tr>
<td>pay</td>
<td>money</td>
<td>(20, 22)</td>
<td>discharge</td>
<td>obligations</td>
<td>(32a)</td>
</tr>
<tr>
<td>accrue</td>
<td>obligation</td>
<td>(38b)</td>
<td>cause</td>
<td>damage</td>
<td>(40)</td>
</tr>
<tr>
<td>rescind</td>
<td>contract</td>
<td>(41)</td>
<td>sue</td>
<td>infant</td>
<td>(41b)</td>
</tr>
</tbody>
</table>

The lecturer's text has been examined ergatively (see Halliday, 1985a: 144-154) and the Mediums identified for the Material and the non-"be" Relational processes (with the Agents and other participants being ignored) in order to focus on the types of noun-verb combinations that Spencer (1975/6) reported as a feature of legal texts.

Table 4.1 (above) reveals the richness of these combinations in the lecturer's text. Though some of these are certainly general and not limited to the legal domain, the majority would appear to be specific to the legal register. For example, a person can perform, avoid, be held to, make, rescind, enter into, or repudiate a contract, obligations can be imposed, honoured, discharged, or can accrue, and rights can be
conferred or lost. While some are specialised “technical” words or “terms of art” (Mellinkoff, 1963), such as rescind and repudiate, many of the verbs are of the type described by Spencer, having an “extended” meaning in the legal context.

4.4 Ideational features

Transitivity

An analysis of the transitivity patterns in the text was carried out (see Figure 4.6 below). The processes of the 62 conjunctively related units of the text have been labelled using Halliday’s taxonomy (participants and circumstances have not been labelled). The analysis revealed that the text was dominated by Relational and Material processes. There were a total of 65 Relational type processes (33 Attributive, 21 Identifying, and 11 Existential), and 52 Material processes in the text with only 9 Mental, and 4 Verbal processes. These results are consistent with those claimed for expository texts, in contrast to narratives which are dominated by Material processes (Martin and Peters, 1985: 71).

Figure 4.6: Transitivity analysis

Verbal
(1) I am asked to advise the infant student as to whether:

(a) he is liable for the damage done or the rent due prior to his repudiation of the lease, and

(b) he can recover back the rent he has already paid.

(2) In order to advise the infant (2a) it is necessary to consider the law relating to the contractual capacity of infants. (3) Infants are one group of persons whom the law regards as lacking full contractual capacity. (4) The general rule is that any contract made by an infant is unenforceable against the infant. (5) The purpose of the rule is to protect infants from exploitation (5a) by allowing them to escape legal liability under any contract they may enter into. (6) But contracts with infants are not null and void. (7) They are simply unenforceable against the infant. (8) Thus, if the contract is performed, (8a) anything done under it will be recognised by the courts as having been legally done.

(9) There is an exception to the general rule in the case of contracts for necessary goods and services and/or beneficial contracts of service. (10) Such contracts are enforceable by and against the infant - (10a) although the infant need only pay a “reasonable” price regardless of what the contract price was. (11) In addition to these contracts there is a second class of contracts which are not simply unenforceable against the infant, no matter what.
This second class of contracts is more difficult to define. Most of the cases have concerned contracts to lease or purchase land or to purchase shares in a company. However it has also been held that a contract under which an infant joins a partnership and marriage settlement contracts are in this category. All such contracts impose continuing obligations and confer continuing rights upon the parties to the contract. As such the rule is that these contracts are voidable at the election of the infant. But if he does not elect to avoid the contract during his minority (or within a reasona'le time of his attaining 18 years) then his right to avoid the contract will be lost and, as an adult, he will be held to the contract and to obligations arising in the future.

If the infant elects to avoid a voidable contract during his infancy or within a "reasonable time" of attaining 18 years then it has been held that he cannot be made liable for any obligations that would have arisen after the date of repudiation. However, in the famous case of Steinberg v Scala it was also established that, if the infant had obtained some benefit under the contract, he cannot recover back money already paid. This is because the contract was perfectly valid at the time it was entered into and thus money paid under it was lawfully the property of the payee. The only exception to this rule being where there is a "total failure of consideration" so that the infant gets nothing of what he was entitled to expect under the contract. In Steinberg v Scala it was said that because the infant had become the legal owner of the shares, even though no dividends were ever paid on them, there had not been a total failure of consideration. The infant got exactly what he had contracted for.

In this case the infant has been in occupation of the flat for two months when he repudiates the contract. Thus there is no total failure of consideration in this case.

I assume that the "infant student" is still an infant when he repudiates. If he is not there may be a question as to whether he can still lawfully repudiate the contract. Has he acted within a reasonable time of reaching 18?
(31) I need further information on this point.

(32) On the assumption that the right to repudiate has not been lost, it is clear that all future obligations which would otherwise have arisen under the lease are now discharged. (33) Thus the infant is not liable for rent due in the future. (34) But what about rent due but unpaid at the date of repudiation? (35) Also can he recover back rent already paid?

(36) On the authority of Steinberg's Case it is clear that he cannot recover back the rent already paid (36a) since this is not a case in which there has been a total failure of consideration.

(37) On the other hand, the position with rent due but unpaid is more difficult. (38) But the better view seems to be that because contracts which are voidable at the election of the infant are in fact binding on the infant until he repudiates, then any obligation accrued but unsatisfied as at the date of repudiation will have to be honoured.

(39) On this view the infant would not only have to pay the arrears of rent, (40) he would also be liable for damage caused (40a) as that would be an obligation imposed on him by the contract prior to the date of repudiation.

(41) On the other hand, if the effect of the infant's repudiation is to "rescind" the contract (41a) (as was said in Steinberg v Scala) (41b) there would not be a contract left after repudiation on which the infant would be sued - (42) and thus he would escape liability for the rent unpaid and for the cost of the necessary repairs. (43) Although the matter is unclear, (43a) my view is that the infant should be liable for the arrears of rent and the cost of the repairs. (44) Any other result would be most unjust.

(45) In summary therefore, my advice to the infant is:

(a) You cannot recover back the rent already paid because there has not been a total failure of consideration in this case. You have had the use of the flat for at least two months.
(b) It is not certain that you will be liable for arrears of rent or for the cost of repairs - but the likelihood is that you will be liable for both.

The domination of Relational processes is a feature of expository texts that cuts across academic disciplines. Halliday (1988: 172-3), in his discussion of the language of physical science, concludes that in scientific writing:

... concepts are organised into taxonomies, and constructions of concepts (processes) are packaged into information and distributed by backgrounding and foregrounding; and since the grammar does this by nominalising, the experiential content goes into nominal groups. The verbal group signals that the process takes place; or, more substantively, sets up the logical relationship of one process to another, either externally (a causes x), or internally (b proves y).

Nominalisation and grammatical metaphor will be discussed later but the result is that the main part of the message, the experiential content, "goes into nominal groups" and the verbal groups are reduced to being empty linking verbs or relational processes. Halliday (ibid: 173) identifies "a very large number of different verbs" in the categories mentioned above which usually function in scientific contexts as signifying relational intensive ("be" type, e.g. become, constitute, serve as, define) or circumstantial ("be" + a circumstantial relation 'at, on, after, with, because of, in order to, etc.', e.g. cause, accompany, produce, require, apply to) including verbs which express the "causing of a specific effect, e.g. speed up, encourage, obscure, improve, diminish ('make faster, more likely, less clear, better, less/fewer')". While the members of this latter group can be interpreted grammatically as realising either relational or material processes, "it is usually the relational feature that predominates when they are used in scientific contexts" (ibid: 173).

Although in the lecturer's text the vast majority of the relational processes were encoded as the verb "be" itself, there were some examples of other verbs as described above, for example, relating (2a), lacking (3), concerned (13), attaining (17, 19), become (24), reaching (30), caused (40b), left (41b).

**Polarity**

A feature cited in the literature on legal language (Charrow et al., 1982; Danet, 1985) is the high frequency of negatives, and in particular double negatives, and these often contribute to processing difficulties in legal documents. The lecturer's text contains 19 negatives with six being double negatives (units 6, 11, 24, 27, 36, 45), so this feature of legal language has been borne out by the lecturer's text and contributes no doubt to its difficulties for some students.
Verbal Groups: Tense

Analysis of the logical structure of the Lecturer “S” text reveals shifts in tense which harmonise with the schematic structure of the overall text and reflect the flow of the argument and logical development of the text. For example, in the short first section which lists the issues or questions of the problem, the simple present tense is used, outlining the questions at hand ("These are the questions"). The simple modal can recover in unit 1 is equivalent to the simple present is able to recover. There is also an example of the present perfect tense (or “past in present” in Halliday’s terms, with the primary tense being the present and the secondary tense the past) in unit 1 which relates the past events as outlined in the problem question to the issue of present outcomes.

The second section on the relevant law is also predominantly in the simple present tense which presents the detailed facts of what the law relevant to the problem question is (“This is the relevant law”). Three out of the four paragraphs that comprise this section are overwhelmingly in the simple present tense with only one example of simple past tense (unit 10a). There are two examples of the present perfect tense (or “past in present” in Halliday’s terms) in units 13 and 14 which are about decisions of past cases that are relevant now in the present. There are also three incidences of the simple future tense (in units 15, 17, 18) all of which are in association with the use of the conditional conjunction “if”. As discussed previously, the dialectics of the legal process dictate that alternative possibilities and perspectives are examined and evaluated. One of the devices for achieving this is the use of the conditional (e.g. “If such and such is the case, then this will happen”).

The final paragraph of the second section, however, is somewhat different from the other three as it is primarily focussed in the past tense. Its purpose is to elaborate the law as determined by what was established (unit 20) and what was said (unit 24) in the leading relevant case of Steinberg v. Scala. The first sentence (units 19, and 19a) is in harmony with the three previous paragraphs being basically a statement in general of what the law is under the conditions as outlined by clause 19. The marked theme of unit 20, in the famous case of Steinberg v. Scala, signals a shift of focus to a specific relevant case that occurred in the past. Apart from the verbal groups (cannot recover, being, is) in units 20 & 23 that state what the rule in Steinberg v. Scala is and what the exception to the rule is, which are of course in the present tense, all of the verbal groups in units 22 to 25 are in the simple past or past perfect tense (“past in past”) referring to the events and legal reasoning related to the Steinberg v. Scala case (“In Steinberg v. Scala this happened/was said”).
Section three in the text begins with the parallel marked theme, *In this case*, which shifts the focus from the discussion of the relevant law in general to what is applicable to the facts of the case at hand. The seven paragraphs of this section contain a mixture of tense forms which reflect the logical thread of the discussion in this section. Definite conclusions regarding the legal status of events and actions in the problem are in the simple present tense in the first half of this section (e.g. units 27, 32, 36, 36a). ("*My conclusions are ...*"). Any necessary assumptions are made explicit in the second paragraph of this section which again is largely in the simple present tense. ("*My assumptions are ...*"). Throughout this section there are a number of instances (in units 26, 30, 32, 36a) of the present perfect tense ("past in present") signifying our present interest in the implications or ramifications of past events which is what this section is all about - applying the law to the facts of the problem.

Another feature of this section that is highly significant is the number of conditional clauses and associated modalised verbal groups which reflect varying degrees of certainty about the probability, possibility, and necessity of various outcomes. (Modality will be discussed in detail below under the Interpersonal function). Conditional clauses appear in units 29, 32, and 41 while modalised verbal groups occur in units 29 (*may be*), 29a (*can repudiate*), 32 (*would have arisen*), 35 (*can recover*), 36 (*cannot recover*), 38 (*will have to be honoured*), 39 (*would have to pay*), 40 (*would be liable*), 40a (*would be*), 41b (*would not be*) and (*would be sued*), 42 (*would escape*), 43a (*should be liable*), 44 (*would be*). Clearly the degree of modalised verbas in this section increases in direct relation to the uncertainty of the conclusions. The first four paragraphs where the conclusions are definite and clear (unit 27, *Thus there is*; 32, *it is clear that*; 36, *it is clear that*) contain in total only five of these modalised verbas while the remaining nine modalised verbal groups appear in the final three paragraphs of this section where the outcome is *more difficult* (37) and *unclear* (43).

The last section (unit 45), which is a summary of the conclusions reached, mirrors in brief the previous section. It too contains a mixture of tenses and some modalised verbal groups commencing with the simple present (*my advice ... is*). The first conclusion is *more definite* containing high value modality (*cannot recover*) with the accompanying reasons utilising the present perfect tense ("past in present") referring back to the facts or past events of the problem that lead to the present conclusion. The second set of conclusions are more tentative, however, containing simple present tense and simple future tense in projected clause complexes with the modal expressions *not certain* and *the likelihood* ("*My conclusions are that this will probably happen*").
Nominal Groups: Modification

The nominal groups in the lecturer's text have been analysed in Figure 4.5 (above) in the discussion of the textual metafunction. The epithets and other modifiers (such as classifiers) in the nominal group contribute a great deal to the experiential meaning of the text while attitudinal epithets and intensifiers contribute to the interpersonal meaning (Halliday, 1985a: 169). (See Table 3.2, p.48, and the discussion in pp. 55-6).

Martin and Peters (1985: 83) maintain that one of the common functions of exposition is to classify and this feature is apparent in this text to some degree in the frequency of Classifier Thing structures such as infant student (units 1, 28), contractual capacity (units 2a, 3), and voidable contract (unit 19). (See Table 4.2 below).

Table 4.2: Classifier - Thing

<table>
<thead>
<tr>
<th>Classifier Thing</th>
<th>CRU</th>
</tr>
</thead>
<tbody>
<tr>
<td>infant student</td>
<td>(1,28)</td>
</tr>
<tr>
<td>contractual capacity</td>
<td>(2a,3)</td>
</tr>
<tr>
<td>legal liability</td>
<td>(5a)</td>
</tr>
<tr>
<td>necessary goods and services</td>
<td>(9)</td>
</tr>
<tr>
<td>beneficial contracts of service</td>
<td>(9)</td>
</tr>
<tr>
<td>reasonable price</td>
<td>(10a)</td>
</tr>
<tr>
<td>contract price</td>
<td>(10a)</td>
</tr>
<tr>
<td>marriage settlement contracts</td>
<td>(14)</td>
</tr>
<tr>
<td>reasonable time</td>
<td>(17, 19, 30)</td>
</tr>
<tr>
<td>voidable contract</td>
<td>(19)</td>
</tr>
<tr>
<td>legal owner</td>
<td>(24)</td>
</tr>
<tr>
<td>future obligations</td>
<td>(32)</td>
</tr>
</tbody>
</table>

The system of contract law clearly depends on the development and recognition of different categories of contracts, rights and obligations etc. For example, the development of the law regarding the classification of types of contracts as being “necessary” or essential, or as “beneficial” (usually educationally) to the infant has created the distinction between fully enforceable infant contracts as opposed to void infant contracts. Similarly, the adjective “reasonable” in other contexts functions as an epithet but in the legal context frequently functions as a classifier. For example, in the law of negligence given that a duty of care exists, one is expected to show “reasonable care” and the standard that is adopted by the courts is the so-called “objective” test of what one would expect of “the reasonable man in the street”. In the present case, the law recognises that the right of an infant to repudiate a voidable contract extends to a “reasonable time” of reaching adulthood. It is for the courts to decide in the given circumstances what can be classified as “reasonable” or not. Mellinkoff (1963) and others have commented that the conscious use of somewhat vague words and phrases such as “necessary”, “beneficial”, and “reasonable” enables the law an important degree of flexibility of interpretation.
'Minor Processes'

While there are no examples in this text of the kind of complex prepositions noted in statutes and legal documents by a number of authors cited in Chapter 2, there are a number of specific legal collocations involving everyday prepositions worthy of mention. These include contracts ... unenforceable against the infant (unit 4), liability under a contract (unit 5a), the binomial expression contracts ... enforceable by and against the infant (unit 10), voidable at the election of the infant (unit 16), liable for any obligations (unit 19a), a contract on which the infant would be sued (unit 41b).

The binomial is a characteristic feature of statutes and legal documents as discussed previously and a prepositional one such as by and against in the author's experience proves far more difficult for students than the more common noun binomial goods and services (unit 9), or even the doublet null and void (unit 6).

Charrow et al. (1982) and Danet (1985) both commented on the use of as to as a distinctive feature of legal discourse. The former authors cited as to as one of a number of grammatical and discourse features that caused comprehension problems for jurors in US. courtrooms. The example they give is as follows:

As to any question to which an objection was sustained, you must not speculate as to what the answer might have been or as to the reason for the objection (Charrow et al., 1982: 177).

In the present text, there were two instances of as to, both in connection with the conditional whether (in units 1, and 29). The examples listed above and the two that appear in the lecturer's text all have the meaning "regarding" appearing to be redundant in all instances in terms of the total meaning conveyed (except for the initial position in the Charrow et al. example above). That is, both sentences in the lecturer's text function perfectly adequately with the as to omitted. It would appear then to be an example of a stylistic turn of phrase, or piece of courtroom "legalese" that the lecturer has unconsciously incorporated into his answer which is appropriate to the legal register in general.

Lexical 'Content'

The vocabulary used in the text is a combination of technical and specialised legal terms and jargon (such as null and void, capacity, failure of consideration, and repudiation), and more general non-subject-specific academic lexis (such as rule, exception, category, assumption, and likelihood). Figure 4.3 (above) groups the lexis in the text into a number of broad categories including Legal Judgments; Legal Documents; Legal Obligation / Rights; Certainty / Uncertainty; People; Goods, Property, Services; Money;
Time; Legal Status; Legal Action; Legal Opinion. It is clear that the text is dominated by technical and specialised legal lexis with a large number of everyday words such as *infant*, *minority*, *capacity*, *necessary*, *avoid*, and *consideration*, having a specialised legal meaning. Maley (in press) observes that areas such as contract law (and also property and tort) often “fairly bristle with technical and arcane terms” because many of the key concepts and principles are so ancient dating back to medieval times.

The taxonomic organisation of field specific lexis in the text is illustrated below for the second section regarding the different categories of infant contracts recognised in law. Infant contracts could thus be represented as belonging to a cline with *null and void* at one end of the scale and *fully enforceable* (i.e. *enforceable by and against* the infant) at the other with *voidable* as an intermediary category between *fully enforceable* and *unenforceable against* the infant (the general case) as in Figure 4.7 below:

*Figure 4.7: Taxonomic organisation of vocabulary*

<table>
<thead>
<tr>
<th>INFANT CONTRACTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Generally</td>
</tr>
<tr>
<td><em>unenforceable against</em> infant</td>
</tr>
<tr>
<td>but not <em>null &amp; void</em></td>
</tr>
<tr>
<td>(i.e. <em>enforceable by</em> infant)</td>
</tr>
</tbody>
</table>

**EXCEPTION (1)**
- *(necessary goods & services)*
- *(beneficial contracts of service)*
- *enforceable by & against* infant

**EXCEPTION (2)**
- *(lease/purchase land, shares)*
- *(partnership, marriage settlement)*
- *voidable at election of infant* (during infancy or within reasonable time of adulthood)

4.5 Interpersonal features

The discussion that follows centres on modality and person as the chief realisations of the interpersonal function in this text; consequently, the other features are discussed only briefly.

Attitude, Comment, Lexical ‘Register’

It is a general feature of writing at university level that it tends to be impersonal and to eschew strong expressions of subjective attitude or emotion, valuing much more highly
objectivity and detachment. It is therefore most unusual to encounter a high level of the aforementioned features in scholarly writing across the disciplines. Our legal text, while not necessarily classifiable as typical “academic expository prose”, is no exception in this regard. The only strongly attitudinal expression in the lecturer's text appears to be most unjust (CRU 44) referring to any result other than the one proposed. This is found at the end of the third section and is used as a justification for the conclusion or opinion expressed. It seems significant that this attitudinal feature is encoded in very formal lexis (cf. unfair) and is kept till the very end of the discourse after a long and detailed objective discussion of the law and its application to this particular case.

Comment adjuncts such as frankly, unfortunately and the like are similarly not a normal feature of scholarly writing and are not apparent in the lecturer's text. Likewise on the individual word (or lexical item) level, there is an absence of colourful expressive language such as colloquialisms and other informal lexis which are not appropriate to the academic written register, the vocabulary of which is nearly always formal and impersonal in most contexts.

Person

This text has an interesting combination of choices with regard to person as has been pointed out in the discussion on personal reference above. One of the general characteristics of written academic expository discourse across disciplines is its tendency to prefer the third person to produce an impersonal, “objective” stance towards the subject under discussion. While the first person pronouns I, and we (and their derivatives) do occur in academic prose with the latter especially in pedagogic contexts such as in academic textbooks, it is the avoidance of first person in favour of the third person (often with passive constructions) such as “it is thought that”, “it is argued that”, or “this paper argues” when advancing ideas and arguments that is far more characteristic. The use of the second person you is quite uncharacteristic in the written academic context.

However, in written legal judgments the individual personal tenor of the discourse is an historically important part of the English common law. As Maley (1989: 71) has pointed out:

Historically, it is a basic principle of English and English derived law that each individual judge will find and declare the law as he himself understands it to be.

Although legal judgments are usually written to be later read in court (and perhaps subsequently published in law reports), it is the use of features such as direct address, vocatives, honorifics, and first person that “sustains the convention that judicial
discourse is interactive spoken discourse" (ibid: 73). Maley maintains furthermore that "the first person viewpoint is ... an explicit manifestation of the judge's constitutional role" (ibid: 73).

The use of both the first and the second person (units 1, 28, 31, 43a, & 45; and unit 45; respectively) in this text then reflects two aspects of the legal problem question. Firstly, it is a learning simulation in which the student is practising being a lawyer advising a client on their legal position. Thus, Williams writes that "the technique of solving academic problems is almost the same as the technique of writing a legal opinion upon a practical point" (as quoted by Howe, 1990: 219). Secondly, the legal problem question involves forecasting the court's decision so it has a number of similarities with judicial discourse. Both the lawyer and the judge apply their legal understanding and expertise to reach an individual opinion about the legal matter in question and the use of the first person explicitly signals the individual nature of that opinion. The use of the second person, however, focuses explicitly on the lawyer-client simulation. Thus in this answer to the legal problem, the tenor shifts from addressing the marker/lecturer about the client's case (Sections 1-3) to directly addressing the client himself with the legal opinion.

Mood

Nearly all the sentences of the lecturer's text are in the declarative mood being statements of information or propositions advanced by the writer for the reader to consider. There are three interrogatives, however, that are important in the structure of the discourse. These interrogatives all occur in the third section of the text (Application of the law to the facts) at units 30, 34, and 35. The first brings to the reader's attention the unresolved question of the exact age of the infant at the time of the events and the legal implications that flow from this. It is generally accepted that omission of information in legal problems by the examiners/lecturers is intentional and its identification and the legal ramifications of the various possibilities are important parts of the answering of the question. Gaskell (1989: 78) in his advice to students on answering law exam problems and essays, says:

You may not have all the facts. This is deliberate. You are entitled to say 'more evidence is needed on [eg] intent'. You must then continue by saying how that evidence would affect your opinion.

Enright (1987: 350) points out that the students' task in dealing with omissions of information in problem questions is analogous to that of a solicitor in an interview with a client where the solicitor "has to identify the gaps in the story, appreciate their
significance and ask questions to fill them” which no doubt is why omissions of information are often a characteristic of the legal problem question.

The three interrogatives in the text are all presenting the issues to be discussed and resolved but unlike questions in spoken interaction, they do not expect an actual reply on the part of the reader. These “rhetorical questions” are, however, very important in terms of structuring the text since they each explicitly enunciate an Issue (Howe’s fourth unit), which is then followed by discussion of the law that applies to the Facts (Howe’s seventh unit) leading to the writer’s conclusions or legal Opinion (Howe’s final unit) on the matter. Their effectiveness appears to lie in their ability to clearly focus the reader’s attention on the heart of the matter through the shift in mood from declarative to interrogative which invites the reader to speculate on or anticipate the answers which follow.

Modality

As Maley (1985, 1989, in press), Iedema (1991, 1993), and Korner (1992) attest, the important types of modality in the legal context are clearly modalizations of probability ( certainties of outcomes and facts), and modulations of obligation ( rights and duties of the parties) and this is also reflected in our text (see Figure 4.8 below).

As the preceding discussion on verbal groups indicated, the modalised verbal groups appear chiefly in the third and fourth sections of the text, i.e. the application of the law to the facts and the summary of the conclusions. Some of the metaphorical realisations of modality listed below do occur in the second section on the relevant law and these are all modulations of obligation, necessity or potentiality as technical or general legal lexis such as liable, capacity, enforceable, avoid, obligations, and held to. The majority of the metaphors of modality do, however, occur in the third and fourth sections of the text as was clearly the case for the modal verbs.

While this text contains a great deal of implicitly subjective modality (26 modal finites), the majority of the metaphors of modalization are explicitly objectively expressed and these only occur in the third and fourth sections of the text.

Examples include clear (units 32, 36), uncertain (unit 43), not certain (unit 45), the likelihood (unit 45), the position ... is more difficult (unit 37, which has been glossed as the position ... is less certain/clear), the better view seems to be that...(unit 38, which has been glossed as it seems likely that or more simply as just probably). The only examples of explicit subjective modalization occur right at the end of the text in units 43a (my view is ...which can be glossed as I think / in my opinion as a metaphorical or
incongruent realisation of probably) and unit 45 (my advice to the infant is... glossed also as in my opinion as a grammatical metaphor for probably). This accords with the general writing style across academic disciplines (as discussed previously) in which objectivity is favoured over expressions of explicit subjectivity, but differs from... that Maley (1989) has reported regarding judicial discourse where there is substantial explicit expression of personal opinion so that “there is an individual personal tenor of discourse coexisting with the institutional one" (p. 72).

**Figure 4.8: Modality (Lecturer “S” Text)**

Mo = modalization of probability; Mu = modulation of obligation.

h = high value; m = median value; l = low value.

(a) Finite Modal Operators (implicit, subjective)

<table>
<thead>
<tr>
<th>Finite Modals</th>
<th>Modality</th>
<th>CRU</th>
</tr>
</thead>
<tbody>
<tr>
<td>can recover</td>
<td>Mo(Mu) (l)</td>
<td>(1) will have to be ... Mo (m)/Mu (h)</td>
</tr>
<tr>
<td>may enter</td>
<td>Mo (l)</td>
<td>(58) would have to pay Mo (m)/Mu (h)</td>
</tr>
<tr>
<td>will be recognised</td>
<td>Mo (m)</td>
<td>(8a) would be liable Mo (m)</td>
</tr>
<tr>
<td>need only pay</td>
<td>Mu (l)</td>
<td>(10a) would not be Mo (m)</td>
</tr>
<tr>
<td>will be held</td>
<td>Mo (m)</td>
<td>(18) would be sued Mo (m)</td>
</tr>
<tr>
<td>cannot be made liable</td>
<td>Mo (h)</td>
<td>(19a) would escape Mo (m)</td>
</tr>
<tr>
<td>would have arisen</td>
<td>Mo (m)</td>
<td>(19a) should be liable Mo (m)/Mu (m)</td>
</tr>
<tr>
<td>cannot recover</td>
<td>Mu /Mo (h)</td>
<td>(20) would be Mo (m)</td>
</tr>
<tr>
<td>may be</td>
<td>Mo (l)</td>
<td>(29a) cannot recover Mo (h)</td>
</tr>
<tr>
<td>can repudiate</td>
<td>Mu (*)</td>
<td>(29a) will be liable Mo (m)</td>
</tr>
<tr>
<td>can recover</td>
<td>Mu /Mo (l)</td>
<td>(35) will be liable Mo (m)</td>
</tr>
<tr>
<td>cannot recover</td>
<td>Mo (h)</td>
<td>(36) will be lost Mo (m)</td>
</tr>
</tbody>
</table>

(b) Other Modal Expressions (Metaphorical realisations)

<table>
<thead>
<tr>
<th>Other Modals</th>
<th>Modality</th>
<th>CRU</th>
</tr>
</thead>
<tbody>
<tr>
<td>liable</td>
<td>Mu (h)</td>
<td>(1, 19a, 33, 40, 43a, 45, 45) clear Mo (h)</td>
</tr>
<tr>
<td>unclear</td>
<td>Mo (l)</td>
<td>(43) necessary Mu (h)</td>
</tr>
<tr>
<td>not certain</td>
<td>Mo (l)</td>
<td>(45) the likelihood Mo (m)</td>
</tr>
<tr>
<td>capacity</td>
<td>Mu (*)</td>
<td>(2a, 3) unenforceable Mu (l)/Mu (m)</td>
</tr>
<tr>
<td>allowing ... to</td>
<td>Mu (l)</td>
<td>(5a) escape ... liability Mu (l)</td>
</tr>
<tr>
<td>enforceable</td>
<td>Mu (h)/Mu (*)</td>
<td>(10) obligations Mu (h)</td>
</tr>
<tr>
<td>avoid</td>
<td>Mu (l)</td>
<td>(17, 17a, 19) held to Mu (h)</td>
</tr>
<tr>
<td>entitled to</td>
<td>Mu (l)</td>
<td>(23a) repudiate Mu (*)</td>
</tr>
<tr>
<td>renunciation</td>
<td>Mu (*)</td>
<td>(34, 41, 41b) binding Mu (h)</td>
</tr>
<tr>
<td>position ... more difficult</td>
<td>Mo (l)</td>
<td>(37) the better view seems to be Mo (m)</td>
</tr>
<tr>
<td>my view is</td>
<td>Mo (m)</td>
<td>(43a) my advice is Mo (m)</td>
</tr>
</tbody>
</table>

(a) implicit/subjective realisations (i.e. modal verbs)

<table>
<thead>
<tr>
<th>Modulation (Mu)**</th>
<th>Modalization (Mo)</th>
</tr>
</thead>
<tbody>
<tr>
<td>low 3 high 5</td>
<td>low 4 high 2</td>
</tr>
</tbody>
</table>

(b) metaphorical realisations (almost all objective)

<table>
<thead>
<tr>
<th>Modulation (Mu)**</th>
<th>Modalization (Mo)</th>
</tr>
</thead>
<tbody>
<tr>
<td>low 10 high 16</td>
<td>low 3 high 4</td>
</tr>
</tbody>
</table>

** modulations of inclination or potentiality, i.e. Mu (*) not included
As Figure 4.8 (above) indicates, some of the modalities (such as can recover in units 1 & 35, cannot recover in unit 20, and should be liable in unit 43a) are ambiguous; that is, they can be interpreted arguably in more than one way. Unit 1 can be glossed as either whether he is allowed to recover the rent (modulation of obligation), or whether he has any possibility of recovering the rent (modalization of probability). Likewise, unit 43a can be glossed as either my view is that the infant is probably liable etc. (modalization of probability), or as my view is that the infant ought to be liable etc. (modulation of obligation). Such are the subtleties and intricacies of the modal verbs that it is not surprising that many second language learners experience considerable difficulty and uncertainty with the nuances of meaning of these verbs.

Overall, the pattern and distribution of modality accords with other research that has been conducted on legal English in a number of related contexts. Maley (1989) in her research on judicial discourse also found a number of expressions in which the modality was ambiguous commenting that “ambiguities of this kind are not uncommon and support the comments of writers such as Lyons (1977: 791) and Leech and Coates (1983: 80) that some indeterminacy of modality is inherent in natural language data” (p. 77). Furthermore, Maley (1989: 82) found that judges used more modalised expressions of opinion, inferential possibility and necessity, and conditionality in their legal judgments than they did modulations of obligation and permission. With congruent expressions of modality, this was certainly true of the lecturer’s text with twenty modal verbs realising modalization of probability and only nine modals realising modulation of obligation. With metaphorical expressions of modality, however, the picture is reversed with twenty six modulations of obligation compared to nine modalizations of probability. Sixteen of these modulations (and none of the modalizations) were, however, found in the second section of the text which is an elaboration of the relevant decided law and so sets out in detail and certainty the legal rights and obligations of infants in general when entering into contracts. But in the third and fourth sections of the text when applying the law to the facts, there is much more uncertainty as reflected in the roughly equal numbers of metaphorical expressions of modalization and modulation and this combined with the congruent realisations of modality (modal finites) reflects the dominance of modalizations over modulations in the text when applying the law to the facts of the problem, and thus accords with Maley’s findings reported above on judicial discourse, which she points out may be “surprising to those who think of the law as essentially certain, impersonal, authoritative” (Maley, 1989: 82).

Korner (1992) demonstrated that in solicitor-client interviews the choices of modality reflect the dominance/deference relationship of the parties with respect to the matters
under discussion with the solicitors using high value modulations when advising the clients of their legal obligations and the actions they should take but low value modalities when speculating on the outcomes of their disputes involving higher authorities such as the courts or government departments.

The modality choices in the lecturer's text reveal that modulations of obligation are almost all expressed as outer values, i.e. either high obligation (what must be done or is required - a total of 21 cases) or low obligation (what may be done or is allowed - a total of 13 cases). There is only one example of median value modulation in the text and this probably reflects the nature of the law as a system of rules which functions to define and assign rights and duties (what is allowed and what is required) as clearly and precisely as possible. Modalizations of probability, on the other hand, are predominantly of median to low value (what probably is true or what possibly is true - in a total of 18 and 7 cases respectively) with only three high value expressions of probability (what certainly is true). These results are similar to those reported by Korner above for solicitor-client interviews.

4.6 Register

Field

The field in this text is of a highly technical and specialised kind: academic legal English, the language of lawyers and the law school. More specifically, in the context of legal education it involves the discussion of the law of contract and in particular the legal capacity of infants to enter into contracts. That is, it is an educational task of the law school which requires the student to analyse a set of facts or scenario involving one or a number of parties (the problem) and to structure an answer which applies the relevant law (legal principles and judgments) to the facts of the problem. In the answer, the student is expected to cite authorities for legal propositions, discuss alternative outcomes, identify any assumptions necessary when insufficient information is provided, and to reach an overall conclusion about the likely outcome of the case. The student in effect is practising being a solicitor or lawyer in providing "mock" advice about a "client's" legal position. This type of task - answering of a legal problem question, is also an assessment task and forms the predominant means of assessment of students' performance in the course Principles of Commercial Law.

The ideational meanings discussed above, especially transitivity patterns, tense and vocabulary choices, reflect the requirements of the field. Material and relational processes predominate in a task that not only requires the discussion of concrete events, the problem facts (and thus material processes), but also the classification and
elaboration of the relevant legal principles and the assigning of rights and obligations based on those legal principles (and thus relational processes). The choices of tense (past tense for *what happened* -the problem facts, present tense for *what the law is* -the relevant legal principles, and future tense for predictions of outcome -*what the court will probably decide*), and the categorisation of the events and issues contained in the problem into appropriate technical and specialised legal language (demonstration of knowledge of content) are all necessary requirements of this field of discourse.

**Tenor**

While in the university situation there is an obviously unequal power relationship between students and teachers, students as writers have “power over what their readers read” (Drury and Webb, 1989: 93). The relationship between reader and writer that has the most prestige in this setting is the formal and impersonal one, i.e. “with maximum distance between reader and writer” (Drury and Gollin, 1986: 209). However, a notable feature of this lecturer’s text is the choices of person (the use of the first person in sections 1-3, and the second person in the last section) which make the text more personal than other academic prose. The text, nevertheless, is formal rather than informal, containing technical and specialised lexis with a singular lack of colloquialisms and attitudinal expressions. It thus shares some of the features reported of judicial judgments where use of the first person and other features more characteristic of spoken interaction are prominent. The tenor shifts in the text from talking about the client in the case (with a number of instances of the writer using first person) to a simulated client-lawyer interaction where the client is addressed directly in the second person in the advice given in the conclusion seeming also to sustain the convention that Maley (1989: 73) reports of judicial discourse that it is “interactive spoken discourse”.

Another important interpersonal feature that this text also shares with other legal texts is the extensive use of modality (modalizations of probability and modulations of obligation) in particular in its third and last sections. Modulations of obligation are strongly expressed being either high obligation (*required to*) or low obligation (*allowed to*) so that the duties and rights recognised in law are clearly defined. The modalizations of probability, however, reflect the inherent uncertainties involved in the legal process whose fundamentals are the adversarial system and contestability. Opinions of outcomes are, thus, not so definitely expressed being usually of median value (*probably*) and expressed either with implicit subjectivity (i.e. by a modal finite) or with explicit objectivity (*in all probability*). Explicit subjective expressions of opinion (*in my opinion*) do, however, appear towards the end of the discourse clearly indicating to the reader the final conclusions reached by the writer.
Mode

**Lexical Density**

The lecturer's text has a lexical density of 5.5 (i.e. 341 lexical items divided by 62 clauses, not counting embedded clauses as separate clauses) and therefore is quite formal abstract prose as measured by this criterion.

**Grammatical Metaphor**

Some mention has been made of grammatical metaphor in the discussions on transitivity, conjunction, and modality (above). Further examples and elaboration of grammatical metaphor in the lecturer's text are given here, especially nominalisation and the incongruent realisation of conjunction. The examples in Table 4.3 (below) illustrate some of the many examples of grammatical metaphor in the text. The importance of nominalisations for thematic structure is illustrated by the fact that all the metaphors of logical connection above appear in thematic position in the text and so comprise the topical (experiential) theme. In their congruent form, however, they merely realise textual theme (as all conjunctions do) with the topical theme assigned to first experiential expression which follows.

**Table 4.3: Some examples of grammatical metaphor**

<table>
<thead>
<tr>
<th>meaning</th>
<th>congruent form</th>
<th>incongruent realisation</th>
<th>CRU</th>
</tr>
</thead>
<tbody>
<tr>
<td>modulation:</td>
<td>before he repudiated the lease</td>
<td>prior to his repudiation...</td>
<td>(1)</td>
</tr>
<tr>
<td></td>
<td>we need to consider</td>
<td>it is necessary to consider</td>
<td>(3a)</td>
</tr>
<tr>
<td></td>
<td>they can not be enforced</td>
<td>they are ...unenforceable</td>
<td>(8)</td>
</tr>
<tr>
<td>modalization:</td>
<td>it is likely that</td>
<td>the likelihood is that</td>
<td>(46)</td>
</tr>
<tr>
<td>action:</td>
<td>protect ... from being exploited</td>
<td>protect ... from exploitation</td>
<td>(6)</td>
</tr>
<tr>
<td></td>
<td>when the infant elects</td>
<td>at the election of the infant</td>
<td>(17)</td>
</tr>
<tr>
<td></td>
<td>totally fails to give consid'n.</td>
<td>a total failure of consid'n.</td>
<td>(24)</td>
</tr>
<tr>
<td></td>
<td>has occupied the flat</td>
<td>in occupation of the flat</td>
<td>(27)</td>
</tr>
<tr>
<td>quality:</td>
<td>while he is under 18 years</td>
<td>during his minority</td>
<td>(18)</td>
</tr>
<tr>
<td>logical connection:</td>
<td>so that infants can be protected</td>
<td>the purpose of the rule is ...</td>
<td>(6)</td>
</tr>
<tr>
<td></td>
<td>as well there is</td>
<td>in addition to these contracts</td>
<td>(12)</td>
</tr>
<tr>
<td></td>
<td>except for where</td>
<td>the only exception to the rule</td>
<td>(24)</td>
</tr>
<tr>
<td></td>
<td>if</td>
<td>on the assumption that</td>
<td>(33)</td>
</tr>
<tr>
<td></td>
<td>because of the Steinberg ruling</td>
<td>on the authority of ...</td>
<td>(37)</td>
</tr>
</tbody>
</table>
The textual features of cohesion (with reference being dominated by personal pronouns and demonstratives; conjunction by the logico-semantic relations of consequence, condition, concession, and contrast; and lexical cohesion by lexical repetition), thematic progression, voice, nominal groups with extensive qualification and concomitant esphoric reference, and collocational lexis (as discussed above), together with the text's high lexical density and use of grammatical metaphor all realise the mode of the context of situation and identify the text as abstract, fairly formal, and tightly structured prose containing features of both narrative (especially in the use of personal reference) and exposition (especially in the range of conjunctive relations and the use of grammatical metaphor).

This chapter has thus presented a very detailed systemic functional linguistic analysis of a lecturer's "model" answer to a legal problem question, one which was originally set as a tutorial discussion question. In order to more fully explore the features of the legal problem genre, the following chapter presents systemic analyses of two other texts written by different lecturers as suggested or "model" answers to two other types of problem questions set for the C165 course: an examination question and an assignment question.
CHAPTER 5

ANALYSIS OF LECTURERS' TEXTS: 2

EXAMINATION PROBLEM QUESTION

The following question was set by lecturer "G" as a final examination question for the C165 course:

M. University contracted Cosner Constructions Pty Ltd (CC) to build a new Commerce building on the south side of the campus. The contract specified that it should be completed and ready for occupation by February 1992. In fact it was not ready until February 1993.

M. University claims that CC should be liable for the following:

(i) $500,000 for erecting temporary accommodation on the campus,

(ii) the extra $200,000 it cost to furnish the building due to the exorbitant inflation rate over the 12 month period.

(iii) $200,000 to compensate the Commerce students for the frustration and disappointment of not being in the building earlier. And also for the loss of enjoyment in missing out on the use of the new lecture theatres for 12 months.

(iv) $50,000 for the loss in staff morale, and

(v) $100,000 as punishment to discourage builders from breaking deadlines in the future.

Advise the University of the likely success of these claims? (sic)

5.1 Lecturer "G" text

The complete text of Lecturer "G"'s suggested answer (804 words) to the above examination question is reprinted in the Appendix (see Appendix 4, p. 259). As for the previous text (Lecturer "S") analysed in Chapter 4, the Lecturer "G" text was divided into conjunctively related units (CRUs) and the text's schematic structure, thematic progression and network of conjunctive relations mapped. (See Figure 5.1 below). Although these two texts are of roughly comparable length, the shorter Lecturer "G" text has almost twice as many paragraphs (23) as the longer Lecturer "S" text (13). In addition, the shorter text contains seven headings around which the material has been organised whereas the Lecturer "S" text is in standard essay format without any headings. While these differences may merely reflect the personal writing style preferences of the two lecturers, it is also possible that they reflect differences of style and expectation between writing in the examination mode, where clarity and conciseness
are paramount due to the constraints of time (and headings, thus, extremely useful), and the essay situation in which the writer has the opportunity to demonstrate more breadth and depth of knowledge and to more carefully craft the writing process. With half the paragraphs in the Lecturer “G” text being one sentence in length together with the abundant use of headings, the writing is in marked contrast to the previously analysed text in this regard and has more in common with aspects of journalism and summary writing.

There are also a number of divergences in both punctuation and grammar in the examination question and the suggested answer written by lecturer “G”. The instruction to students (Advise the University of the likely success of these claims), although in the imperative mood, is punctuated as an interrogative. Similarly, in the answer text (see Figure 5.1 below), CRU 25 is punctuated as an interrogative rather than a declarative. The clause complex that is comprised of CRUs 21 and 21a is marked grammatically, combining elements of two separate conditional sentence forms into one (standard grammar would be either to substitute would for will and also the subjunctive were for was - although was is certainly now common usage - for the so-called second conditional pattern or to use is instead of was for the first conditional structure). In addition, the lecturer has employed a dangling participial phrase Applying the rule to the claims by M. University to begin CRU 22. There is also the use of the incorrect homonym principle in CRU 17 where principal is intended.

The grammatical and spelling anomalies cited above possibly reflect the haste with which the answer was written (the text was written by the lecturer at short notice for my benefit), as well as some possible writing weaknesses of the lecturer himself. The matter of punctuation in legal writing will be explored in greater detail below in the discussion of the answer to the assignment question problem (Lecturer “N” text) which exhibits a considerable amount of non-standard punctuation.

5.2 Schematic structure

The text is structured around the following seven headings: Introduction, Types of damage, Non-pecuniary loss, Pecuniary loss, Remoteness, Causation, and Mitigation. Like the previously analysed text, it also generally proceeds along the lines of the schema or eight “units of discourse” proposed by Howe (1990) and the model of argumentation outlined by Gaskell (1989: 79) of problem/issue followed by proposition, 1

1"(1) the situation, (2) the instruction, (3) the forecast, (4) the issue, (5) the law, (6) its authority, (7) the application of the facts, (8) opinion (and advice)" (Howe, 1990: 231).
The contract in question has obviously been breached.

This is not at issue.

The question requires a discussion of the Remedy of Damages for breach of contract.

The purpose of damages in contract is to compensate and not to punish with the main objective being to put the innocent party in the same position as if the contract had been fully performed.

The question requires the discussion of:

1) Different types of damages - particularly pecuniary, non-pecuniary and punitive damages.
2) Remoteness principle,
3) Causation, and
4) Duty of M. University to mitigate.

Firstly, as already stated, the object of damages is to compensate and not to punish, so M University would be wasting their time pursuing the claim for $100,000 as punishment to discourage builders from breaking deadlines in the future.

Secondly, a distinction needs to be made between pecuniary and non-pecuniary loss with the latter generally not recoverable for breach of contract.

Pecuniary loss is financial loss.
NON-PECUNIARY LOSS

9a Definition & Examples
   (Law)
   (1)
   Applies to Problem Q:
   ($500,000 for temporary accommodation and $200,000 for extra furnishing cost)
   whilst non-pecuniary loss is non-financial loss
   e.g. pain and suffering, loss of enjoyment, vexation etc.
   ($200,000 for students for frustration and disappointment along with the $50,000 for the loss in
   staff morale).

10 Generally, non-pecuniary loss is not recoverable for breach of contract.
   An exception to this is
   where the subject matter of the contract is purely for enjoyment/entertainment.
   (Jarvis v. Swans Tours).

11 As the subject matter of the contract (new Commerce building) is not purely for enjoyment/entertainment.
   the case would not fall within the limited exception.

12 Therefore, the claims for non-pecuniary loss would not be recoverable.

13 No general bar for recovering pecuniary loss for breach of contract.

14 However, the principles of Remoteness, causation and Mitigation still need to be overcome
   for a plaintiff to recover.

15 Courts will allow damages to be recovered that are not too remote.

16 The principle (sic) rule that is used for guidance as to where to draw the line
   is the rule in Hadley v. Baxendale.
There are 2 limbs to the rule in Hadley v. Baxendale:

1) damages arising "naturally" or in the "usual course of things" as a consequence of the breach.

This limb has been equated with reasonable foreseeability.

(per Victoria Laundry v. Newman.)

2) damages "as may reasonably be supposed to have been in the contemplation of both parties,
at the time when they made the contract.

The first limb covers ordinary type losses whilst the second limb covers "special losses" and consequential damages.

These special type losses will normally not be awarded unless the defendant was put on notice of the special circumstances.

Applying the rule to the claims by M. University the $500,000 for erecting temporary accomodation would arise naturally and as a consequence of the breach and so would therefore not be too remote.

Hence, the claim would fall within the first limb of Hadley v. Baxendale.

The claim for the extra $200,000 cost to furnish the building would not fall within the first limb of Hadley v. Baxendale.
The issue is whether it would be covered by the second limb?

As nothing was said concerning such a loss

at the time the contract was made,

the $200,000 would not fall within the second limb

i.e. it would not have been within the contemplation of both parties.

The damages claimed must be caused by the breach.

Clearly the $500,000 for erecting temporary accommodation would not have been a loss

‘but for’ the breach of contract.

On the other hand, CC could argue that the extra $200,000 it cost to furnish the building

was not caused by them but was due to the exorbitant inflation rate

over the 12 month period.

If anything could be said to have caused such a loss

it would be government economic policy.

The plaintiff (M. University) has a duty to mitigate their loss.

Mitigation requires the plaintiff to take reasonable steps to minimise their loss.

Providing the steps taken by M. by erecting temporary accommodation were reasonable

steps to minimise their loss
they would have satisfied their duty to mitigate.

It is difficult to see what else M. University could have done.

In respect to the extra $200,000 to furnish the building

M. may not have discharged their duty to mitigate.

For example, it may have been possible for them to purchase the furniture at the original price with it being delivered 12 months later.

Or if the suppliers refused to do this,

it may have been cheaper for M. to store the furniture.

At the end of the day, M. University would be best advised only to proceed with the claim for the $500,000 it cost to erect the temporary accommodation.
authority, and application. The examination question contains the first two of Howe’s units - the *Situation* (the problem facts) and the *Instruction* ("Advise the University of the likely success of these claims") while the lecturer’s suggested answer contains the following major sections:

- **Section 1** General area of law and its purpose (3 para’s.)
- **Section 2** Issues to be discussed (1 para.)
- **Section 3** Issue 1 (Types of damages) discussed (5 para’s.)
- **Section 4** Issue 2 (Remoteness) discussed (7 para’s.)
- **Section 5** Issue 3 (Causation) discussed (3 para’s.)
- **Section 6** Issue 4 (Mitigation) discussed (3 para’s.)
- **Section 7** Summary (Opinion/advice) (1 para.)

The first four paragraphs (sections 1 & 2) are of an introductory nature and immediately focus the discussion on both the general area of law relevant to the question (and the purpose of the law) and to the issues to be discussed. CRUs one to four correspond to Howe’s *Forecast/Overview* stage while unit five spells out in point form the *Issues* (Howe’s next stage).

The text then develops these four issues sequentially under corresponding headings, with the first issue of the possible types of damages being subdivided into three categories: pecuniary, non-pecuniary, and punitive. The last of these, punitive damages, is dealt with in the first paragraph (CRUs 6-7) of the third section. After a brief restatement of the general purpose of the law regarding damages (Howe’s fifth unit, *Statement of the Law*), a conclusion is made regarding claim (v) of the problem question for punitive damages (Howe’s units, *Application of law to the Facts* and *Opinion*).

The next two paragraphs (CRUs 8-9a) outline the general legal principles that distinguish the first two types of damages, pecuniary and non-pecuniary. Firstly, the general legal rule is given followed by definitions and examples (from the problem question) of each term. These paragraphs, thus, contain Howe’s fifth and seventh units - the *Law*, and *Application of the law to the Facts*.

The next paragraph (CRUs 10-13) deals solely with non-pecuniary loss and is preceded by its own sub-heading. The discussion covers the general rule and exceptions to the rule (Howe’s fifth unit - the *Law*), a case authority (Howe’s sixth unit - *Authority*) cited parenthetically, application of the law to the problem question (Howe’s seventh unit - *Application to the Facts*), including a conclusion regarding claims (iii) and (iv) of the problem (Howe’s *Opinion* unit).
The last paragraph (CRUs 14-15a) of this section on types of damages is also preceded by its own sub-heading. The general rule regarding pecuniary loss is enunciated (Howe's fifth unit - the Law) and then the remaining issues to be resolved are represented (Howe's fourth unit - Issue).

The fourth section of the text on the issue of Remoteness spans seven paragraphs. The first four (CRUs 16-21a) elaborate the general rule and its two "limbs" (the Law), citing relevant case authorities (Authority) both locatively (for the seminal case of Hadley v. Baxendale) and parenthetically (for the later Victoria Laundry case). The remaining three paragraphs (CRUs 22-26c) apply these rules of law to the problem facts (Application to the Facts) reaching conclusions regarding claims (i) and (ii) of the exam question with respect to this criterion.

The fifth section on the issue of causation comprises three paragraphs (CRUs 27-30a) which are also preceded by the appropriate heading. The first single sentence paragraph states the general rule (the Law) but no authority is cited in this instance. The other two paragraphs apply this rule to the facts (Application to the Facts) and present conclusions for claims (i) and (ii) of the problem with respect to the criterion of causation.

The second last section on the issue of mitigation also comprises three paragraphs (CRUs 31-37a) and is preceded by a heading. Like the other sections before, the discussion begins with a statement of the general rule (the Law) in the first paragraph which is followed in the next two paragraphs by the conclusions reached re claims (i) and (ii) meeting the criterion of mitigation by applying the general rule to the facts (Application to the Facts). Again, while no case authorities are cited in this section, the conclusions arrived at are supported by reasons (CRUs 34, 36-37a).

The concluding section (CRU 38) is a summary statement of advice (Howe's final unit, Opinion) about the client's likelihood of success in proceeding with the five claims for damages.

5.3 Textual features

Cohesion

As for the Lecturer "S" text in Chapter 4, the systems of reference, conjunction, and lexical cohesion were explored to determine their contribution to the textual meaning above the level of the sentence.
The reference chains in the Lecturer "G" text have been mapped in Figure 5.2 below. As for the chains in the Lecturer "S" text analysed in the previous chapter, there is extensive use of pronominal or personal reference. The chains which link the human participants in the text are by far the longest and most detailed, running almost the entire length of the text (CRUs 4-38). This branching chain involves both parties to the dispute, the plaintiff (M. University) and the defendant (Cosner Constructions), but centres mostly on the plaintiff, the one who is to be advised. The participants are usually referred to by either proper nouns (M. University, CC) or by personal pronouns or adjectives (they, them, their). Unlike the previous text (Lecturer "S") which incorporates first, second and third person, the exam answer contains no shifts in person remaining in the third person throughout.

There are several other chains of reasonable length including the claim for pecuniary damages (CRUs 22-38) which also incorporates some pronominal reference (it) along with comparative (the epithet such in units 26 & 30a) and demonstrative reference (the anaphoric the). Then there is the breached contract (CRUs 1-28) itself and its subject matter, the new Commerce building (CRUs 12-35), which both utilise the definite article anaphorically.

An important branching chain centres on the two limbs of the rule in the seminal case of Hadley v. Baxendale and spans units 18 to 26b. The ordinal numeratives first and second in conjunction with the definite article identify the two parts of the Hadley v. Baxendale rule. The demonstrative this also appears in this chain (CRU <19>) referring to the whole preceding unit.

Similar uses of the demonstrative this to refer to immediately preceding clauses occur at CRUs 2, 11, and 37. There are also a number of other short reference chains which mostly involve the definite article the being used anaphorically, i.e. referring back to a previously introduced item over relatively short stretches of the text (CRUs 3-5, 4-4, 10-11, 14-18, 14-18, 32-33, 33-38). Some of these (CRUs 10-11, 14-18, 14-18) involve general discussion of contracts and breaches (and thus short reference chains) in contradistinction to the contract of the problem question and its breach which, as discussed above, form a much longer reference chain. The comparative else occurs as part of the short chain about the steps taken by the University to mitigate its loss (CRUs 32, 33, 34), while other referents such as the numerative the latter, the demonstrative these, and the pronoun it occur in short chains (CRUs 8; 20a-21; and 36-37-37a respectively).
Figure 5.2: Reference Chains - "G" text

1. the contract (Unit 1)
   
2. contract
   
3. this

4. a discussion
6. the innocent party

5. the contract
6. the discussion

6a. M. University
6a. M. University

7a. their

9a. breach of contract (Unit 10)
10. the contract
11. this

11. the contract
12. new Commerce building

13. breach of contract
14. the rule in Hadley v Baxendale
   
18. 2 limbs
   
18. the breach
18. 1) Unit 18
18. this limb
18. 2) Unit 18
18. both parties

18. the contract
18. the first limb
20. the second limb
20a. they

21. "special losses"
21. these special type losses

21a. the rule

22. the breach
23. the first limb

24. the building
Conjunction

The network of conjunctive relations is represented to the right of Figure 5.1 (above) which follows the classification and notational conventions of Martin (1992: 243-4) (see Table 3.3, p. 51). This text demonstrates a number of similarities and differences between it and the comparable (but slightly longer) text analysed in the preceding chapter in its employment of the textual resource of conjunction. For example, whereas 43 cohesive conjunctive links were recognised (including six implicit ones) in the lecturer "S" text, the lecturer "G" text utilises a total of only 27 with only one implicit conjunctive link identified. However, the distribution and types of conjunction that occur in the two texts are remarkably similar.

Disregarding "and"s, both texts have roughly equal numbers of internal and external conjunction (lecturer "S" - 21 & 17; and lecturer "G" 15 & 11 respectively). This indicates that the text is almost equally about relating the logical connections between events as occurring in the real world (external conjunction) and between the propositions of the text itself (internal conjunction), but in both cases internal conjunction slightly predominates. This is probably not surprising in that the problem question answer involves elements of narrative, the discussion of events in the real world (the "material" facts), as well as exposition, the analysis and classification of these facts in terms of legal rules and principles and the legal reasoning involved in these decisions (the relevant law and applying the law to the facts).

Similarly, the two texts are dominated by the consequential category of logico-semantic relation (roughly half of all links - 22 out of 43 for text "S", and 16 out of 27 for text "G"). Furthermore, the next most important category in both texts (roughly about a quarter of all links) is the comparative category (a total of 11 comparatives for the "S" text and 6 for the "G" text). Additive and temporal categories of conjunction play a relatively minor role in both texts in terms of number of occurrences.

Within the two main conjunctive categories, the pattern of distribution is also quite similar in both cases. Half of the consequential relations are realised as consequence (consq) in both texts (12 out of 22 in the "S" text and 9 out of 16 in the "G" text), with condition (cond) likewise being the next in importance in both (5 and 4 respectively) followed by concession (conc) in the lecturer "S" text (3 concessives) and purpose (purp) in the lecturer "G" text (2 purposives). Regarding comparative relations, contrast (contr) conjunctives are slightly more predominant in the "S" text than similarity (simil) conjunctives (7 out of 11 comparatives) while similarity conjunctives
(which include the internal reformulatives i.e. and e.g.) are equal with contrast conjunctives in the "G" text (3 each).

There are a number of examples where internal conjunction is utilised in the lecturer "G" text to scaffold the rhetorical structure of the discourse, which Martin (1992: 181) lists as a feature of expository prose. This often tends to occur around paragraph boundaries. For example, in the third section of the text - the discussion of the different types of damages - there are internal conjunctions which occur either at the beginning or the end of a number of the paragraphs of this section. The section begins with the successive conjunction firstly (CRU 6), which is followed by another successive secondly (CRU 8) in the next paragraph. The next sub-section on non-pecuniary loss ends with the internal consequence conjunction therefore (CRU 13) which signals the conclusion reached about the claims for non-pecuniary loss after applying the law to the facts of the problem. In the second sub-section on pecuniary losses in CRU 14, after the statement of the general rule, the next clause (CRU 15) utilises the internal concessive conjunction however to achieve a bridge between this section about types of losses and the next three sections on the other issues to be discussed and resolved.

The fourth section on the issue of remoteness employs the internal consequence conjunction hence at CRU 23 when reaching a conclusion regarding the application of the first limb of the rule on remoteness to the problem facts (i.e. the first claim for damages). Then at the end of this section, the internal comparative conjunction of similarity i.e. is used at CRU 26c to reformulate the conclusion reached regarding the second claim for damages based on the application of the second limb of the Hadley v Baxendale rule to the problem facts.

Further examples of internal conjunction occur in the remaining three sections. The contrast conjunction on the other hand links the discussion in the fifth section on the application of the rule regarding the issue of causation to the first two claims for damages of the problem. In the sixth section about mitigation, the reasons for the conclusions reached are both introduced by internal conjunction (the "e.g." similarity comparative for example of CRU 36, and the alternation additive or of CRU 37) and these clauses end this section. The final brief section, the summary of advice in CRU 38, is signalled by the expression at the end of the day which can be glossed as the summative consequence conjunction in conclusion or the temporal conjunction finally.

The above examples demonstrate that the pattern of internal conjunction plays an important part in constructing and developing the framework which is the schematic structure of the lecturer "G" text. Equally, the types of conjunction mainly in evidence,
the consequentials (chiefly consequence and condition) and comparatives (similarity and contrast), confirm that fundamental aspects of legal reasoning are the reaching of conclusions based on the enunciation of legal principles relevant to the case at hand (the relevant law) which involves examining similarities and differences with previous cases and the application of that law to the facts of the particular case (the reasons for the conclusions reached) “examining the position both for and against your client’s interest” (Fox, 1989: 73).

**Lexical Cohesion**

The lexical strengths in the exam text have been mapped using the same categories (Legal Judgments; Legal Documents; Legal Obligation/Rights; Certainty/Uncertainty; People; Goods, Property, Services; Money; Time; Legal Status; Legal Action; Legal Opinion) as for the Lecturer “S” text in the previous chapter (see Figure 5.3 below).

As was found for the “S” text, there is very little use of synonymy, antonymy, and hyponymy but a considerable amount of collocation (discussed further below) and lexical repetition in the lecturer “G” text, with the predominant means of lexical cohesion clearly being lexical repetition. Examples of synonymy include purpose, objective and object (CRUs 4 & 6a) and mitigate and minimise (CRUs 31, 32, 33, 33a, 35) whilst examples of antonymy include ordinary and special (CRUs 20, 20a, 21, 21a).

Nearly every category has one or more significant examples of lexical repetition as a cohesive device between clauses. For example, in the Law (Legal judgments) category rule occurs 4 times and limb(s) 8 times; in the Legal documents category contract occurs 11 times; in the Legal Obligation/Rights category damages occurs 9 times, claim and recover 6 times, and duty 4 times; in the People category M. occurs 8 times; in the Goods, Property, Services category accommodation occurs 5 times and erect 4 times while furnish/furniture occurs 6 times and building 4 times; in the Time category temporary occurs 5 times; in the Legal Status category loss occurs 14 times, breach(ed) 9 times, pecuniary 4 times, non-pecuniary 5 times, and remote(ness) 4 times; and finally in the Legal Action (Volition) category cause/causation and mitigate/mitigation both occur 5 times in the text.

The main reasons for the predominance of lexical repetition would appear to be the law’s requirement for precision and the nature of legal reasoning. Repetition and the use of specialised legal language with precise legal meanings (the majority of the lexis listed above falls into this category and possesses few or no synonyms) reflects the law’s desire to avoid ambiguity in its classifications and definitions. Repetition is also evident
<table>
<thead>
<tr>
<th>LEXICAL STRINGS</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>SCHEMATIC STRUCTURE</strong></td>
</tr>
<tr>
<td>Law (Legal Judgments)</td>
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<tr>
<td>-----------------------</td>
</tr>
<tr>
<td>1</td>
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<td>2</td>
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<tr>
<td>3</td>
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<tr>
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<td>9</td>
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<td>9a</td>
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<tr>
<td><strong>FEELINGS</strong></td>
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<td>10</td>
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<td>11</td>
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<td>12</td>
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<td>12a</td>
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</tr>
<tr>
<td>14</td>
</tr>
<tr>
<td>Schematic Structure</td>
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<tr>
<td>----------------------</td>
</tr>
<tr>
<td>ISSUE 1 (ADAPTABILITY)</td>
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<tr>
<td>ISSUE 2 (REMOteness) DISCUSSSED</td>
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<tr>
<td>(CAUSATION)</td>
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<td>36</td>
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<td>37</td>
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<tr>
<td>37a</td>
</tr>
<tr>
<td>38</td>
</tr>
<tr>
<td>SUMMARY</td>
</tr>
</tbody>
</table>
in the deductive syllogistic reasoning that is an important part of legal argument which is said to be a combination of analogical, inductive, and deductive reasoning (Howe, 1990: 218). The common syllogistic pattern is the enunciation of a legal rule or principle (L) followed by its application to the facts of a problem (F) leading to a conclusion or opinion (O) about the client's legal position in the matter. Parallel grammatical structure and repetition of whole phrases and clauses are often part of this process.

Clear examples of this kind of reasoning with concomitant parallelism and lexical repetition can be found in the section on non-pecuniary loss (see Figure 5.1 above) from CRUs 10 to 13. Units 10 and 11 give the rule and its exception, units 12 and 12a apply these principles to the problem facts, and unit 13 expresses the conclusion that follows by deduction, which is signalled also by the explicit consequence conjunction therefore. Similarly in the section on Remoteness, this sort of pattern can be seen in units 18, 22, 22a, and 23 on the enunciation and application of the first limb of the Hadley v Baxendale rule to claim(i) of the problem question and also in units 18, 20a - 21a, 26 - 26c on the enunciation and application of the second limb of the rule claim (ii) with the key words, phrases, and structures repeated in this process of logical deduction. A further example of this kind of structural and lexical repetition occurs in the section on Mitigation in units 31 - 33a.

Lexical repetition and parallelism is thus used extensively throughout to create cohesion both within and between paragraphs and sections of the lecturer “G” text. It thus plays a significant part in realising the schematic structure of the text and is especially prominent in the stages involving logical reasoning (the Law, the application of law to the Facts, and the Opinion). Some of the repetition such as in CRUs 3 & 4 (damages for breach of contract and damages in contract) is of importance in achieving thematic progression, which is the subject of the next section.

**Thematic Progression**

The main thematic components of the Lecturer “G” text have been represented in italics in Figure 5.1 (see above) and the patterns of thematic progression in Figure 5.4 (below). As for the analysis presented in the previous chapter, subordinate adverbial clauses have been ignored except where they are thematic (e.g. units 6, 12, 26 & 26a, 30, 33, and 37). Independent clauses with ellipsis (units 14, 22a, 29a) and projected, relative and embedded clauses have also been excluded. Similarly, the discussion here centres on topical theme, textual theme (conjunction) having already been discussed fully above.
Figure 5.4: Thematic Progression (Lect'r "G")

1. **INTRODUCTION** (Heading 1)
   - Purpose of the Law
   - Legal Issues 1-4
   - Purpose of the Law
   - Concl'n re: Q(v)
   - Gen'l Rule 1(b)

2. **TYPES OF DAMAGE** (Heading 2)
   - Definitions 1(a), 1(b)

3. **NON-PECUNIARY LOSS** (Heading 3)
   - Gen'l Rule
   - Except'n & Authority
   - Applic'n to Prob.
   - Concl'n re: Q(iii), (iv)

4. **PECUNIARY LOSS** (Heading 4)
   - Gen'l Rule
   - Issues 2-4

5. **REMOTENESS** (Heading 5)
   - Rules & Case Authorities
   - Concl'n re: Q(i)
   - Concl'n re: Q(ii)

6. **CAUSATION** (Heading 6)
   - Concl'n re: Q(i)
   - Concl'n re: Q(ii)

7. **MITIGATION** (Heading 7)
   - Gen'l Rule
   - Concl'n re: Q(i)
   - Concl'n re: Q(ii)

8. **SUMMARY**
   - Concl'n re: Q(i)
   - Reasons
   - Concl'n re: Q(ii)
   - Reasons
Figure 5.4 (above) reveals considerable differences in the thematic development of the lecturer "G" text compared to that of the Lecturer "S" text. In the "G" text, there are far fewer theme-theme links ("looping" occurs between CRUs 16-17, and 27-28; "leapfrogging" between CRUs 3-5, 22-24, 24-35, and 31-38). The majority of the thematic development in this text occurs when preceding rhemes are picked up by later themes either as simple "chaining" (e.g. CRUs 1-2, 8-9, 10-11, 11-12, 20-21, 22-23, 29-30, 31-32, 32-33, 36-37) or in a "radiating" pattern (e.g. CRUs 3-4&27, 5-7 & 8 & 15, 9-10 & 13, 15-16 & 31, 18-19 & 20 & 22). Some of the theme-theme "radiating" and "chaining" links are quite remote in this text (CRUs 3-27, 5-15, 7-29, and 15-31) and this has been suggested by Perera (1992) as a potential source of comprehension difficulty for readers.

However, although the thematic development of the "G" text is not quite as extensive or as intricate as that of the "S" text (only 4 themes out of 46 CRUs in the "S" text are not linked to previous themes or rhemes compared to 6 out of 38 CRUs for the "G" text), most of the links involve either simple lexical repetition or reference rather than more difficult paraphrase or inferential links. Furthermore, the remote links that have been pointed out above all involve central concepts or parties in the dispute, such as "the remedy of damages" (3-27); the issues of remoteness, causation, and mitigation (5-15); the builders, "CC" (7-29); and the plaintiff, "M" (15-31), and thus are unlikely to create any difficulties for readers especially as there is also the extensive use of headings which signpost the organisation of the text into its various sections and sub-sections.

Not surprisingly, the themes of the text fall into a small number of fairly predictable categories. The majority involve either claims for damages (CRUs 4, 9, 10, 13, 21, 23, 24, 27, 28, 30, 35) which occur in all sections of the text except the last, or the relevant legal principles and rules and their application to this problem (CRUs 8, 11, 15, 16, 17, 19, 20, 22, 26, 30, 32, 33) which occur in all but the two introductory sections and the last summary section. Four themes (CRUs 7, 29, 31, and the final unit 38) concern the parties in the dispute, three (CRUs 3, 5, 25) the question or issue, and two the contract (CRUs 1, 12). This problem is centred totally on elaborating and applying the law concerning damages for breach of contract as this analysis of theme clearly reveals.

Voice

As discussed in the previous chapter, the system of voice is an important resource which allows choices to be made in the mapping of the grammatical subject and the various participants in the text. In the "G" text, there are 17 conjunctively related units (CRUs 1, 4, 8, 15, 16, 17, 19, 18, 21, 21a, 25, 26, 26a, 27, 29, 30, 38) in which a passive
verbal group occurs out of a total of 56 CRUs (compared to 16 out of 65 for the “S” text).

As was found with the previous text, in virtually all of the clauses with passives, the agent has been omitted so that the matter of importance in the text is clearly the event or idea being discussed and not who or what caused the event or idea to occur. Almost half of the examples of passives in the text (CRUs 15, 16, 17, <19>, 18, 21, 27) occur in the enunciation of the relevant general legal issues, and principles and practices concerning the awarding of damages (i.e. in Howe’s fourth and fifth units - Issue & Law). The relevant law in general is clearly the focus here and the agents, i.e. the courts or individual judges etc., are not of concern in this discussion. The fact that a large number of the themes in the text concerned the relevant legal principles and their application (as discussed above) indicates that the passive voice has been employed consistently to enable the thematic development of the text.

Three units which discuss contracts between two parties (CRUs 1, 4, 26a) are concerned with the action or event that occurred regarding the contract and not the parties to the contract and so the option of passive voice has been chosen and agency has been omitted. In CRU 21a, the focus is on the actions of the parties in the dispute (what was done) with the beneficiary (“the defendant”) in subject position and the agent again omitted.

In units 25 and 29, passives occur because in each of the projected clauses the focus (and point of departure in each projected clause) is on the loss being claimed (i.e. the claim for damages) rather than the other participants involved. This again reflects the consistent centring of the discussion in the text around the claims for damages as explored above in the discussion of theme.

The passive voice occurs in several units (CRUs 8, 30, 38) maintaining the impersonal tenor of the text and this is most noticeable in the final unit (especially in comparison with the “S” text which freely uses personal reference and has shifts in personal tenor) where the writer as the agent or giver of the advice is consciously omitted with the point of departure (topical theme) being the clients (M. University) then followed by the advice. This will be further discussed below under interpersonal features.

**Deixis (Nominal Groups)**

The nominal groups in the text have been analysed using Halliday’s classification (1985a: 158 -167) and are presented in Figure 5.5 below.
Figure 5.5: Nominal Groups

| D = Deictic | D₂ = Post-Deictic |
| N = Numerative | E = Epithet |
| C = Classifier | T = Thing |
| Q = Qualifier | (finite or non-finite) |

1. The contract in question

2. D T Q[ T ]


4. The purpose of damages in contract the main objective the innocent party

5. The question the discussion of: 1) Different types of damages - particularly pecuniary, non-pecuniary and punitive damages. 2) Remoteness principle, 3) Causation, and 4) Duty of M. University to mitigate.

6a. the object of damages M. University their time the claim for $100,000 as punishment deadlines in the future.

7. a distinction pecuniary and non-pecuniary loss the latter breach of contract

8. CI CI T CI T D T T Q[ T ]

9. Pecuniary loss financial loss $500,000 for temporary accommodation

9a. non-pecuniary loss non-financial loss pain and suffering, loss of enjoyment, vexation etc.

10. CI T T Q[ T ]

11. An exception to this the subject matter of the contract

12. the subject matter of the contract (new Commerce building)

12a. the case the limited exception.
13. the claims for non-pecuniary loss

14. No general bar for recovering pecuniary loss for breach of contract.

15. the principles of Remoteness, causation and Mitigation

16. damages ...that are not too remote.

17. The principle (sic) rule that is used for guidance as to where to draw the line is the rule in

Hadley v. Baxendale.

18. 2 limbs to the rule in Hadley v. Baxendale: 1) damages arising "naturally"

or in the "usual course of things" as a consequence of the breach.

This limb reasonable foreseeability.

19. 2) damage "as may reasonably be supposed to have been in the contemplation of both

the parties the time when they made the contract.

20. The first limb ordinary type losses

20a. the second limb "special" losses and consequential damages

21. These special type losses

21a. the defendant notice of the special circumstances.

22. the rule the claims by M. University the $500,000 for erecting temporary accommodation

a consequence of the breach

23. the claim the first limb of Hadley v. Baxendale.

24. The claim for the extra $200,000 it cost to furnish the building the first limb of

Hadley v. Baxendale.
25. The issue the second limb

26a. at the time the contract was made

26b. the $200,000 the second limb

26c. the contemplation of both parties.

27. The damages claimed the breach.

28. the $500,000 for erecting temporary accommodation a loss the breach of contract.

29. the extra $200,000 it cost to furnish the building

the exorbitant inflation rate over the 12 month period.

30. a loss

30a. government economic policy.

31. The plaintiff (M. University) a duty to mitigate their loss

32. the plaintiff reasonable steps to minimise their loss.

33. the steps taken by M. by erecting temporary accommodation reasonable steps to

minimise their loss

33a. their duty to mitigate.

34. M. University

35. the extra $200,000 to furnish the building their duty to mitigate.

36. the furniture at the original price 12 months later.

37. the suppliers

37a. the furniture.

38. At the end of the day M. University the claim for the $500,000 it cost to erect the
The "G" text has a great deal of qualifiers (post-modifiers of the nominal head) and hence esphoric reference (i.e. forward reference within the nominal group). The analysis in Figure 5.5 above identifies 35 nominal groups that contain qualifiers which are embedded phrases (indicated by single square brackets) and some of these contain multiple phrasal embedding such as a discussion of the remedy of damages for breach of contract in CRU 3 (4 embedded phrases). The total number of embedded phrases in the text amounts to 44 in 35 nominal groups. These embedded phrases are chiefly to do with contracts and their breach (CRUs 1, 3, 8, 10, 11, 12, 14, 18, 22, 28), remedies for breach (CRUs 3, 4, 6, 7, 9, 9, 9, 9a, 9a, 13, 14, 22, 24, 38), and legal rules (CRUs 11, 15, 17, 18, 18, 23, 24).

The postmodifiers in the nominal groups that are embedded clauses are indicated in Figure 5.5 by double square brackets and a total of 8 finite (e.g. the principle [sic] rule that is used for guidance) and 13 non-finite embedded clauses (e.g. damages arising "naturally"...) were identified in the analysis. Quite a few of these occur in the discussion of the Hadley v Baxendale case (CRUs 17, 17, 13, 18, 18) while others concerned the damages claimed (CRUs 22, 24, 28, 29, 35, 38) and the duties and actions of the plaintiff (CRUs 31, 32, 33, 33a, 35). This text differs slightly from the "S" text in that there is not the same degree of clausal embedding (the "S" text had 11 finite embedded clauses and 23 non-finite clausal embeddings) apparent although the incidence of both phrasal and clausal embedding in the "G" text is still a significant feature that contributes to defining the text as belonging to the legal register.

**Collocation**

The lecturer "G" text was examined ergatively for its noun-verb collocations as was done for the lecturer "S" text in the previous chapter. Collocation is a textual feature at the word level which is often strongly associated with particular functional varieties or registers of language (Halliday, 1985a: 313) and noun-verb collocations or "semantic combinations" have been pointed out to be a feature of legal texts (Spencer, 1975/6; 1980).

In the analysis in Table 5.1 below, the Mediums have been identified for the Material and the non-"be" Relational processes with the Agents and other participants being ignored. This table illustrates some 30 different noun-verb combinations in the lecturer "G" text. Although there are some which are general and not limited to the legal domain
such as to waste time, break deadlines, and purchase, deliver, and store furniture, the majority would appear to be fairly specific to the legal register. For example, a person can make, breach, and perform a contract; or pursue and proceed with a claim; while damages may be allowed, recovered, or claimed; losses awarded or mitigated; and duties satisfied or discharged.

Table 5.1: Material & Relational Processes (Process/Medium)

<table>
<thead>
<tr>
<th>Process</th>
<th>Medium</th>
<th>CRU</th>
<th>Process</th>
<th>Medium</th>
<th>CRU</th>
</tr>
</thead>
<tbody>
<tr>
<td>breach</td>
<td>contract</td>
<td>(1)</td>
<td>erect</td>
<td>accommodation</td>
<td>(22, 28, 33, 38)</td>
</tr>
<tr>
<td>put</td>
<td>party</td>
<td>(4)</td>
<td>claim</td>
<td>damages</td>
<td>(27)</td>
</tr>
<tr>
<td>perform</td>
<td>contract</td>
<td>(4)</td>
<td>cause</td>
<td>damages</td>
<td>(27)</td>
</tr>
<tr>
<td>waste</td>
<td>time</td>
<td>(7)</td>
<td>furnish</td>
<td>buildings</td>
<td>(24, 29, 35)</td>
</tr>
<tr>
<td>pursue</td>
<td>claim</td>
<td>(7)</td>
<td>cause</td>
<td>$200,000</td>
<td>(29)</td>
</tr>
<tr>
<td>discourage</td>
<td>builders</td>
<td>(7)</td>
<td>cause</td>
<td>loss</td>
<td>(30)</td>
</tr>
<tr>
<td>break</td>
<td>deadlines</td>
<td>(7)</td>
<td>mitigate</td>
<td>loss</td>
<td>(31)</td>
</tr>
<tr>
<td>make</td>
<td>distinction</td>
<td>(8)</td>
<td>take</td>
<td>steps</td>
<td>(32, 33)</td>
</tr>
<tr>
<td>overcome</td>
<td>principles</td>
<td>(15)</td>
<td>minimise</td>
<td>loss</td>
<td>(32, 33)</td>
</tr>
<tr>
<td>allow</td>
<td>damages</td>
<td>(16)</td>
<td>satisfy</td>
<td>duty</td>
<td>(33a)</td>
</tr>
<tr>
<td>recover</td>
<td>damages</td>
<td>(16)</td>
<td>discharge</td>
<td>duty</td>
<td>(35)</td>
</tr>
<tr>
<td>use</td>
<td>rule</td>
<td>(17)</td>
<td>purchase</td>
<td>furniture</td>
<td>(36)</td>
</tr>
<tr>
<td>draw</td>
<td>line</td>
<td>(17)</td>
<td>deliver</td>
<td>it (furniture)</td>
<td>(36)</td>
</tr>
<tr>
<td>make</td>
<td>contract</td>
<td>(18, 26a)</td>
<td>store</td>
<td>furniture</td>
<td>(37a)</td>
</tr>
<tr>
<td>award</td>
<td>losses</td>
<td>(21)</td>
<td>proceed with</td>
<td>claim</td>
<td>(38)</td>
</tr>
</tbody>
</table>

5.4 Ideational features

Transitivity

An analysis of the transitivity patterns in the text was carried out (see Figure 5.6 below) using Halliday's taxonomy which identifies six different types of processes, namely Material (doing), Mental (sensing), Verbal (saying), Behavioural (behaving), Relational (being), and Existential (existing).

Figure 5.6: Transitivity analysis

Material      Relational: Attr
(1) The contract in question has obviously been breached. (2) This is not at issue.

Relational: Id
(3) The question requires a discussion of the Remedy of Damages for breach of contract.

Relational: Id Material
(4) The purpose of damages in contract is to compensate and not to punish with the main
objective being to put the innocent party in the same position as if the contract had been
fully performed.

Relational: Id
(5) The question requires the discussion of: 1) Different types of damages -particularly pecuniary,
non-pecuniary and punitive damages 2) Remoteness principle, 3) Causation, and 4) Duty of M.
Relational: Id
University to mitigate.
Firstly, as already stated, the object of damages is to compensate and not to punish. So M.University would be wasting their time pursuing the claim for $100,000 as punishment to discourage builders from breaking deadlines in the future.

Secondly, a distinction needs to be made between pecuniary and non-pecuniary loss with the latter generally not recoverable for breach of contract.

Pecuniary loss is financial loss ($500,000 for temporary accommodation and $200,000 for extra furnishing cost) whilst non-pecuniary loss is non-financial loss e.g. pain and suffering, loss of enjoyment, vexation etc. ($200,000 for students for frustration and disappointment along with the $50,000 for the loss in staff morale).

Generally, non-pecuniary loss is not recoverable for breach of contract. An exception to this is where the subject matter of the contract is purely for enjoyment/entertainment (Jarvis v. Swans Tours). As the subject matter of the contract (new Commerce building) is not purely for enjoyment/entertainment the case would not fall within the limited exception.

Therefore, the claims for non-pecuniary loss would not be recoverable.

No general bar for recovering pecuniary loss for breach of contract. However, the principles of Remoteness, causation and Mitigation still need to be overcome for a plaintiff to recover.

Courts will allow damages to be recovered that are not too remote.

The principle (sic) rule that is used for guidance as to where to draw the line is the rule in Hadley v. Baxendale. There are 2 limbs to the rule in Hadley v. Baxendale: 1) damages arising "naturally" or in the "usual course of things" as a consequence of the breach. This limb has been equated with reasonable foreseeability (per Victoria Laundry v. Newman).

2) damage "as may reasonably be supposed to have been in the contemplation of both parties, at the time when they made the contract.

The first limb covers ordinary type losses whilst the second limb covers "special" losses and consequential damages. These special type losses will normally not be awarded unless the defendant was put on notice of the special circumstances.

Applying the rule to the claims by M. University the $500,000 for erecting temporary
Existential accommodation would arise naturally and as a consequence of the breach (22a) and so would therefore not be too remote. (23) Hence, the claim would fall within the first limb of Hadley v. Baxendale.

(24) The claim for the extra $200,000 it cost to furnish the building would not fall within the first limb of Hadley v. Baxendale. (25) The issue is whether it would be covered by the second limb?

(26) As nothing was said concerning such a loss (26a) at the time the contract was made, (26b) the $200,000 would not fall within the second limb (26c) i.e. it would not have been within the contemplation of both parties.

(27) The damages claimed must be caused by the breach.

(28) Clearly the $500,000 for erecting temporary accommodation would not have been a loss ‘but for’ the breach of contract.

(29) On the other hand, CC could argue that the extra $200,000 it cost to furnish the building was not caused by them but was due to the exorbitant inflation rate over the 12 month period.

(30) If anything could be said to have caused such a loss (30a) it would be government economic policy.

(31) The plaintiff (M. University) has a duty to mitigate their loss. (32) Mitigation requires the plaintiff to take reasonable steps to minimise their loss.

(33) Providing the steps taken by M. by erecting temporary accommodation were reasonable steps to minimise their loss (33a) they would have satisfied their duty to mitigate.

(34) It is difficult to see what else M. University could have done.

(35) In respect to the extra $200,000 to furnish the building M. may not have discharged their duty to mitigate. (36) For example, it may have been possible for them to purchase the furniture at the original price with it being delivered 12 months later. (37) Or if the suppliers refused to do this, (37a) it may have been cheaper for M. to store the furniture.

(38) At the end of the day, M. University would be best advised only to proceed with the claim for the $500,000 it cost to erect the temporary accommodation.

The analysis revealed that the lecturer “G” text was dominated by Relational and Material processes. The “G” text contained a total of 51 Relational type processes (25
identifying, 23 attributive, and 3 existential) and 39 Material processes with only 7 Verbal processes, and 2 Mental processes. These results are very consistent with those found for the lecturer "S" text in the previous chapter and also with those claimed for expository texts (Martin and Peters, 1985: 71) in contrast to narratives.

These results, then, would appear to reflect fundamental features of this type of task which involves exposition and analysis of the relevant principles of law (including the classifications and distinctions made by the courts) and the application of these principles to the material facts of the problem at hand. The analytical process, as Halliday (1988: 172-3) and others have pointed out, requires information to be categorised according to abstract concepts which are organised into taxonomies so that the main experiential content of the clause is carried by the nominal groups with the verbal groups reduced to a linking or relational function. Nominalisation and various types of grammatical metaphor (as discussed in the previous chapter) occur as a result. There is consequently heavy use of the verb "be" (in both the attributive and identifying categories) and other verbs which realise relational meanings in the text, such as requires, fall (within), equated, covers, applying, cost, concerning, cause, mitigate, and minimise.

The actions of the parties and the events of the case, i.e. the material facts, are of course a significant part of the discussion and so material processes ("doing") also figure prominently in these texts as a necessary accompaniment to or contextual framework for the analysis, the application of the law to the facts. Another feature, though, of legal language would appear to be the use of metaphor (in the traditional sense) in the material processes encoded in some legal concepts and expressions, such as to breach a contract, to overcome the principle(s), to draw the line, to satisfy a duty, to put on notice (interpreted in this analysis as Verbal), and to fall within the "limb" of the rule (interpreted here as Relational). This feature could also be seen in the lecturer "S" text in the previous chapter in expressions such as to avoid a contract, to be held to a contract, and to escape liability. This is probably a reflection of the antiquity of case law and areas such as the law of contract in particular.

Polarity

A total of 17 clauses out of the 54 of the whole text (units 2, 4, 6a, 10, 12, 12a, 13, 14, 16, 21, 22a, 24, 26a, 26c, 28, 29, 35) reveal the choosing of negative polarity in the logical formulation of the propositions of the text. This figure seems consistent with that found for the previously analysed text and indicates that in the legal process distinctions about what is and what is not the case are fundamental considerations.
The text begins with a statement of what is not an issue (CRU 2) in the introductory section and then proceeds in unit 5 to define just what the issues and principles to be resolved actually are. Indeed, a number of important propositions and concepts in the text such as the remoteness principle and the types of damages are defined and determined by what they are not. For example, non-pecuniary loss is non-financial loss (CRU 9a) in contradistinction to pecuniary loss (CRU 9) and is generally not recoverable for breach of contract (CRU10). In fact, virtually the whole discussion of non-pecuniary loss in this text is couched in the negative (CRUs 10, 12, 12a, 13). Also, the remoteness principle is also framed in negative terms, that is damages can be recovered if they are not too remote (CRUs 16, 22a).

It would seem then that the use of negatives, as has been reported with statutes and legal documents, is also a noteworthy feature in the answering of legal problem questions.

Tense

The shifts in tense in the lecturer “G” text are very similar to the patterns revealed for the lecturer “S” text and are in harmony with the schematic structure and reflect the flow of the argument and logical development of the text.

Statements of what the issues, I, are (and are not) and what the question involves (the general area of law, L, and its purpose) in the first two sections (CRUs 1 to 5) are in the simple present tense. (“These are the issues”).

Throughout the text, the discussion of the relevant law, L, for each section again is in the simple present tense signifying what the established legal principles on the matter are. (“This is the relevant law”). For example, in the third section on the issue of types of damages, the statement of general rules and principles (and their exceptions) in units 8, 9, 9a, 10, 11, and 14 are all in the simple present tense. Similarly, the discussion of the remoteness principle (issue 2) is largely in this tense (CRUs 17, 18, 20, 20a). There are two occurrences of the future tense in this section (CRUs 16 and 21) for what the courts will decide or allow. The tense of CRU 21a in this connection is rather anomalous (as mentioned above) because the established pattern is clearly for statements of legal rule or principle to be in the present tense so the grammatically marked form adopted is difficult to understand except as an error. The general rule for causation (issue 3) is modalised and in passive voice (CRU 27) but is still in the present tense. Lastly, the general rule regarding mitigation (CRUs 31, 32) is also in the present.

The application of the law to the facts of the problem, F, and the reaching of conclusions usually involves modalised verbal groups which reflect different degrees of
certainty about the likely outcomes of the claims on the various issues. Modality will be discussed fully under Interpersonal features and is a prominent feature of this text as it was for the lecturer "S" text. The application of the law to the facts of the problem also sometimes involves reference to what happened (or didn't) and so the past tense as in units 18, 21a, 26, 26a (on the remoteness issue), unit 29 (on the causation issue), and unit 33 (on the remoteness issue) is necessary.

As mentioned above, modality is an important component of the parts of the text where conclusions are reached (and also reasons for conclusions as in CRUs 36, 37, 37a which look at alternative possibilities) and the final section which summarises the advice or legal opinion, O, of the writer is also modalised.

Modification

The nominal groups in the lecturer's text have been analysed in Figure 5.5 (above) in the discussion of the textual metafunction. An examination of the modification in the nominal groups of the "G" text reveals a similar pattern to that found for the lecturer "S" text in the prominence of determiners, such as the esphoric use of the definite article mentioned in the discussion above on textual features, the large number of finite and non-finite qualifiers (also discussed above), the frequency of the use of classifiers, and the very limited use of other modifiers such as attitudinal epithets and intensifiers.

<table>
<thead>
<tr>
<th>Classifier-Thing</th>
<th>CRU</th>
</tr>
</thead>
<tbody>
<tr>
<td>pecuniary damages</td>
<td>(5)</td>
</tr>
<tr>
<td>non-pecuniary damages</td>
<td>(5)</td>
</tr>
<tr>
<td>punitive damages</td>
<td>(5)</td>
</tr>
<tr>
<td>Remoteness principle</td>
<td>(5)</td>
</tr>
<tr>
<td>pecuniary loss</td>
<td>(8, 9, 14)</td>
</tr>
<tr>
<td>non-pecuniary loss</td>
<td>(8, 9a, 10, 13)</td>
</tr>
<tr>
<td>financial loss</td>
<td>(9)</td>
</tr>
<tr>
<td>temporary accommodation</td>
<td>(9, 22, 28, 33, 38)</td>
</tr>
<tr>
<td>furnishing cost</td>
<td>(9)</td>
</tr>
<tr>
<td>non-financial loss</td>
<td>(9a)</td>
</tr>
<tr>
<td>staff morale</td>
<td>(9a)</td>
</tr>
<tr>
<td>subject matter</td>
<td>(11, 12)</td>
</tr>
<tr>
<td>Commerce building</td>
<td>(12)</td>
</tr>
<tr>
<td>reasonable foreseeability</td>
<td>(&lt;19&gt;)</td>
</tr>
<tr>
<td>ordinary type losses</td>
<td>(20)</td>
</tr>
<tr>
<td>&quot;special&quot; losses</td>
<td>(20a)</td>
</tr>
<tr>
<td>consequential damages</td>
<td>(20a)</td>
</tr>
<tr>
<td>special type losses</td>
<td>(21)</td>
</tr>
<tr>
<td>inflation rate</td>
<td>(29)</td>
</tr>
<tr>
<td>12 month period</td>
<td>(29)</td>
</tr>
<tr>
<td>economic policy</td>
<td>(30a)</td>
</tr>
<tr>
<td>reasonable steps</td>
<td>(32, 33)</td>
</tr>
</tbody>
</table>
Clearly, classification is a significant component of the experiential meaning in this text as there are a total of 33 instances of classifiers utilised (see Table 5.2 above). Half of these involve different types or classifications of damages (4) or losses (12) and another five, the kind of accommodation. This is hardly surprising when the case involves resolving a number of claims for damages for losses incurred due to the building company's failure to build the new accommodation (Commerce building) on time. This text also reveals several instances of the use of the adjective “reasonable” which figures prominently in many areas of the law including contract law and the law of torts. The foreseeability of losses occurring and the steps taken to mitigate them are classified or assessed according to the “objective” standards of the so-called “reasonable man” in the street. There is also the distinction made between “ordinary” and “special” losses which are encompassed by the two parts (“limbs”) of the remoteness rule (Hadley v Baxendale). These somewhat vague words, as has been pointed out before, are important as a means of enabling a certain degree of flexibility in interpreting the law, especially in the light of changing community standards and expectations.

Minor Processes and Lexical ‘Content’

While this text demonstrates few of the features like complex prepositions, doublets (the doublet pain and suffering occurs in CRU 9a), and binomials that characterise legal documents and statutes, there are a number of expressions involving everyday prepositions which seem specific to the legal register. For example, the preposition “within” is used a total of five times in the text (CRUs 12a, 23, 24, 26b, 26c) mostly in the sense of something being within certain guidelines and collocates with the verbs fall and be and the nouns exception, limb, and contemplation in the text. The expression as to which was discussed in the previous chapter occurs once in the “G” text in unit 17. The expression put on notice of (unit 21a) seems also to be fairly specific to the legal register. Likewise, the prepositional expression but for (unit 28) has an archaic and poetic flavour that is redolent of the legal domain.

As was found with the previous text, the “G” text contains lexical content that is a mixture of technical and specialised legal terms and expressions (such as breach, pecuniary, punitive, remoteness, foreseeability, limb, causation, mitigation) and more general non-subject-specific academic lexis such as objective, principle, exception, rule, but the legal lexis clearly predominates with some everyday words such as remote, and limb being used in a specialised legal way. The taxonomic organisation of field-specific lexis in the text is illustrated in Figure 5.7 below for the third section regarding the different categories of types of damages recognised in law:
5.5 Interpersonal features

**Attitude, Comment, Lexical ‘Register’**

Modifiers and intensifiers that express the speaker’s attitude towards the subject under discussion, comment adjuncts such as *frankly, unfortunately*, and colourful expressive language such as colloquialisms and other informal lexis are not readily apparent in this text and are clearly inappropriate in this context. The modifier *best* in CRU 38 is one of the few examples of an attitudinal marker in the text and, as was found for the previous text, has quite a formal tone.

**Person**

The lecturer "G" text is in contrast to the text analysed in the previous chapter in that there are no shifts in person in the text. The "G" text remains in the third person throughout and is thus in keeping with the impersonal and "objective" stance usually adopted by academics writing scholarly papers within their discipline. Passive constructions (as discussed above) are sometimes utilised in order to avoid the personal pronoun as in CRUs 8 (*a distinction needs to be made* instead of *we need to distinguish*) and CRU 38 (*M. University would be best advised* instead of *I would strongly advise*).

**Mood**

All the sentences of the "G" text (and nearly all in the "S" text) are in the declarative mood as statements of information or propositions advanced by the writer in the course of the legal analysis. As noted previously, there is one sentence (CRU 25) which has been punctuated as a question (interrogative) whereas it has been written in the declarative as an indirect question. In the "S" text when interrogatives occur, they are an
important means of structuring the text (a textual rather than interpersonal feature) and
likewise in the “G” text, the indirect “rhetorical question” in CRU 25 states the issue
which is answered in the immediately following paragraph (application of the law to the
facts and conclusion). The interpersonal dimension of the lecturer “G” text is largely
expressed through modality which is examined below.

Modality

Table 5.3: Modality (Text “G”)

Mo = modalization of probability; Mu = modulation of obligation.
Mo(*) = modalizations of usuality; Mu(*) = modulations of potentiality
h = high value; m = median value; l = low value.

(a) Finite Modal Operators (implicit, subjective)

<table>
<thead>
<tr>
<th>Finite Modals</th>
<th>Modality</th>
<th>CRU</th>
</tr>
</thead>
<tbody>
<tr>
<td>would be wasting</td>
<td>Mo(m)</td>
<td>(7)</td>
</tr>
<tr>
<td>needs to be made</td>
<td>Mu(h)</td>
<td>(8)</td>
</tr>
<tr>
<td>would not fall</td>
<td>Mo(m)</td>
<td>(12a)</td>
</tr>
<tr>
<td>would not be</td>
<td>Mo(h)</td>
<td>(11)</td>
</tr>
<tr>
<td>need to be overcome</td>
<td>Mu(h)</td>
<td>(15)</td>
</tr>
<tr>
<td>will allow</td>
<td>Mo(m)</td>
<td>(16)</td>
</tr>
<tr>
<td>may be supposed to</td>
<td>Mu(I)</td>
<td>(18)</td>
</tr>
<tr>
<td>will not be awarded</td>
<td>Mo(m)</td>
<td>(21)</td>
</tr>
<tr>
<td>would arise</td>
<td>Mo(m)</td>
<td>(22)</td>
</tr>
<tr>
<td>would not be</td>
<td>Mo(m)</td>
<td>(22a)</td>
</tr>
<tr>
<td>would fall</td>
<td>Mo(m)</td>
<td>(23)</td>
</tr>
<tr>
<td>would not fall</td>
<td>Mo(m)</td>
<td>(24)</td>
</tr>
</tbody>
</table>

(b) Other Modal Expressions (including Metaphorical realisations)

<table>
<thead>
<tr>
<th>Other Modals</th>
<th>Modality</th>
<th>CRU</th>
</tr>
</thead>
<tbody>
<tr>
<td>obviously</td>
<td>Mo(h)</td>
<td>(1)</td>
</tr>
<tr>
<td>requires</td>
<td>Mu(h)</td>
<td>(3, 5)</td>
</tr>
<tr>
<td>generally</td>
<td>Mo(*)</td>
<td>(8, 10)</td>
</tr>
<tr>
<td>allow</td>
<td>Mu(I)</td>
<td>(16)</td>
</tr>
<tr>
<td>foreseeability</td>
<td>Mu(*)</td>
<td>(19)</td>
</tr>
</tbody>
</table>

(a) implicit/subjective realisations (i.e. modal verbs)

<table>
<thead>
<tr>
<th>modulation (Mu)</th>
<th>low</th>
<th>median</th>
<th>high</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1</td>
<td>5</td>
<td>15</td>
</tr>
</tbody>
</table>

(b) other modal expressions

<table>
<thead>
<tr>
<th>modulation (Mu)**</th>
<th>low</th>
<th>median</th>
<th>high</th>
<th>low</th>
<th>median</th>
<th>high</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1</td>
<td>5</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>2</td>
</tr>
</tbody>
</table>

** modalizations of usuality or modulations of potentiality, i.e. Mo(*) & Mu(*) not included

The “G” text confirms the patterns found for the “S” text in that modality, realised as
modulations of obligation and modalizations of probability, is an important aspect of
these texts and appears chiefly in the sections or stages of the text involving the application of the law to the facts (Howe's seventh unit, *Application to the Facts*) and the final advice offered based on the conclusions reached (Howe's last unit, *Opinion*). *Table 5.3* (above) reveals that in the "G" text, modalizations predominate over modulations (as was also found by Maley, 1989: 82, in her analysis of legal judgments) and they are mostly expressed in congruent forms as finite modals (22 modalizations of probability out of 25 modal verbs).

As was the case with the "S" text, modalizations of probability were predominantly of median and low value (15 and 7 respectively out of a total of 24 for the text), i.e. signifying what is *probably* true and what is *possibly* true concerning the legal matters under discussion. Similarly, expressions of obligation, on the other hand, were realised as outer values, i.e. either high obligation (what *must* be done or *is required* - a total of 8 cases) or low obligation (what *may* be done or *is allowed* - in one case). It would therefore appear that the assigning of rights and duties in the law is a much more clearcut exercise than predicting the likely success of a claim or the legal outcome when applying the law to a set of facts.

While the modal finites are all regarded as being implicit subjective realisations of modality (see *Table 3.5*) and are the main expressions utilised in the "G" text, the other expressions of modality (see *Table 5.3 (b)* above) mostly fall into the objective category. These include modal adjuncts of probability such as *obviously* and *clearly*, and modal adjuncts of usuality such as *generally* and *normally*, which are classed as being implicit objective, and modal adjectives such as *possible* that fall into the explicit objective category. It is interesting that the lecturer "G" text (and the "S" text also) does not favour the use of explicit subjective modality such as *I think* and *in my opinion* which Maley (1989) found to be a significant feature of judicial discourse. This would appear, then, to be one clear difference between legal writing in academe (at least with legal problem questions) and that of the legal judgment.

### 5.6 Register

The field and tenor dimensions of the register of the "G" text are manifested through the ideational and interpersonal meanings in the lexico-grammar as outlined in those sections above, and will not be further elaborated here except to point out again that the "G" text is parallel to the "S" text in both these dimensions (in the technicality of the field which places importance on classification, and in the use of modality as a primary expression of tenor) with the notable difference that the "G" text maintains a formal impersonal tenor throughout in contrast to the shifts in personal tenor revealed in the "S" text.
The mode dimension is manifested through the textual resources of the lexico-grammar (as explored in detail above) and the "G" text, likewise, exhibits considerable similarity with the "S" text in the patterns of textual meanings utilised: cohesion is achieved principally through reference (in which personal reference figures prominently linking the parties involved, as well as the use of demonstrative reference), lexical repetition (of key terms and phrases), conjunction (expressing mostly the consequential relations of consequence and condition, and to a lesser extent concession, and the comparative relations of similarity and contrast); thematic progression (which largely reinforces the schematic structure of the text); and the significant use of voice (in the verbal groups), qualifiers (in the nominal groups), and collocations.

The lexical density of the text and the degree of grammatical metaphors employed will, however, be briefly explored as further features of the contextual variable of mode.

**Lexical Density and Grammatical Metaphor**

The lexical density of the text was calculated (as per Halliday, 1985c) by adding the number of purely lexical items and dividing this figure by the number of clauses (ignoring embeddings). This revealed a total of 323 lexical items over 51 clauses and a lexical density of 6.3, a result similar to the figure calculated for the previous text and locating the "G" text also as quite formal and abstract prose compared to spoken discourse which has a typical density of between 1.5 and 2 (ibid: 80).

**Table 5.4: Some examples of grammatical metaphor**

<table>
<thead>
<tr>
<th>meaning</th>
<th>congruent form</th>
<th>incongruent realisation</th>
<th>CRU</th>
</tr>
</thead>
<tbody>
<tr>
<td>modulation:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>we need to discuss</td>
<td>we need to discuss</td>
<td>requires a discussion of</td>
<td>(3, 5)</td>
</tr>
<tr>
<td>maybe they could have purchased</td>
<td>it may have been possible for them</td>
<td>(36)</td>
<td></td>
</tr>
<tr>
<td>action:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>we need to discuss</td>
<td>requires a discussion of</td>
<td>(3, 5)</td>
<td></td>
</tr>
<tr>
<td>contract which has been breached</td>
<td>breach of contract (3, 8, 10, 14, 18, 22, 28a)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>pursuing the claim ...to punish</td>
<td>pursuing the claim ...as punishment</td>
<td>(7)</td>
<td></td>
</tr>
<tr>
<td>we need to distinguish</td>
<td>a distinction needs to be made</td>
<td>(8)</td>
<td></td>
</tr>
<tr>
<td>to have been contemplated by</td>
<td>... in the contemplation of</td>
<td>(18)</td>
<td></td>
</tr>
<tr>
<td>logical connection:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>damages exist so that</td>
<td>the purpose of damages</td>
<td>(4)</td>
<td></td>
</tr>
<tr>
<td>exist mainly in order to put</td>
<td>the main objective being to put</td>
<td>(4)</td>
<td></td>
</tr>
<tr>
<td>except where</td>
<td>an exception to this is where</td>
<td>(11)</td>
<td></td>
</tr>
<tr>
<td>in general there is no bar for</td>
<td>no general bar for</td>
<td>(14)</td>
<td></td>
</tr>
<tr>
<td>if the contract had not been breached</td>
<td>'but for' the breach</td>
<td>(28)</td>
<td></td>
</tr>
</tbody>
</table>
An analysis of grammatical metaphor in the "G" text (see Table 5.4 above) reveals similar patterns to those of the "S" text in that many actions (verbs in their congruent realisation) have been nominalised. There are also some metaphorical expressions of modality and logical connection (conjunction). A number of the specialised legal expressions utilised in this text are nominalisations of a more congruent form, such as breach, remoteness, causation, mitigation, and foreseeability. As Halliday (1985c: 75) points out, nominalisation is an important means of structuring text in that it enables items to occupy thematic position in the clause where they can also have added modifiers and qualifiers. The extensive use of nominalisation in the "G" text contributes to the text's lexical density and its level of abstraction and reflection. These aspects of the mode of the text help to produce a style of writing that is considered more sophisticated, mature and authoritative and thus is a feature of writing in the academic context as this text is.

A rather longer legal problem question\(^1\) that was set as an assignment question in the course by another lecturer (lecturer "N") is examined in the final section of this chapter.

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\(^1\)A fuller discussion of the features of the legal problem question itself occurs in the following discussion of the Lecturer "N" assignment question. The lecturer "G" examination question, the answer to which has just been discussed in much detail, differs it would seem from the standard sort of problem questions that are set in examinations for law students (Davis, 1994, personal communication). The "G" question (for non-law, i.e. commerce students) has a very short scenario of problem facts (the Situation) and a single focus in terms of areas of law and thus issues (i.e. damages for breach of contract) whereas apparently it is much more usual for the scenario to be longer and more detailed and to have been carefully written to throw up a variety of issues and areas of law with the problem facts resembling elements of a number of actual cases. Part of the law student's task is, then, to tease these issues out of the mass of details and to deal with them in some logical fashion (e.g. in order of importance). The single issue question (and also its answer) appears to be a modification or adjustment to the target audience (i.e. non-law students) and "reads more like a check-list" of one area of law according to my informant (ibid).
ASSIGNMENT PROBLEM QUESTION

The following question was set as a mid-semester assignment in *Principles of Commercial Law* and represented the first time that students had written an answer to a legal problem question in the C165 course:

*By the beginning of this year the Phoenix hotel in Fremantle had become extremely rundown and tatty. The owner, George, decided to spend $100,000, which he had recently won, on refurbishing the premises.*

*On a friend's advice, he decided to call for tenders, and placed an advertisement in the West Australian. Fifteen tenders were received. The lowest tender was from Bruce of Bruce's Renovations Pty. Ltd. As this was the lowest tender, George decided to accept it. George did not, however, contact Bruce to inform him that his tender had been accepted.*

*One of the documents issued by George to all tenderers was a letter of undertaking which said, in part, "further, and in consideration of the trouble and expense incurred by you in preparing the tender documents and examining and considering this tender, we undertake that the same shall not be withdrawn by us before the expiration of two calendar months from the date on which tenders closed, but shall remain binding upon us and may be accepted at any time before the expiration of such two calendar months and we understand that you are not bound to accept the lowest or any tender."

Bruce signed a copy of this letter and submitted it with his tender.

*Tenders closed at 5.00pm Friday April 10.*

*One of the reasons why George delayed in notifying Bruce of his acceptance of Bruce's tender was that, as a result of an oversight, the tender documents had not stipulated a completion date. George spoke to Bruce on the telephone about this and said, "I am considering awarding you the job, but would you be able to complete the work before the end of August? This point is crucial."

Bruce replied, "O.K. my tender stands. I guarantee that the job will be finished before the end of August this year."

*At this moment an important horse race, which George wishes to see on television started, so he said to Bruce, "I can't talk now, but I'll drop a note in the post."

*George, being a rather dilatory fellow, did not contact Bruce and nothing further happened until Friday June 10 when George, looking on his calendar, noted that the two month period expired at 5.00pm. He therefore prepared and posted a letter accepting Bruce's tender, subject to the August competition deadline, and posted it at noon on Friday June 10. It duly arrived at Bruce's home on Monday June 13.*

*Meanwhile Bruce, who has three small children and a large mortgage, had been desperately trying to get work and had organised another job which would tie up all his men and equipment until the end of September.*
On Saturday June 11, Bruce entered into a binding contract for this other job. He was horrified to receive George's letter on Monday June 13. He promptly phoned George and said, "I didn't hear from you and so I assumed you had not accepted my tender." He explained that he had committed himself to another contract and that there was no way he could do both jobs at once. George said, 'That's your problem. If you refuse to do my job I will sue you for breach of contract. However, since your resources will now be very stretched, I am prepared to allow you an extension of time to complete the work. I will give you until the end of September.'

In reliance upon this promise to extend time, Bruce employed additional workmen and bought extra equipment and undertook to do both jobs.

It is now the beginning of October and Bruce has completed the work. George has told him that he has no intention of paying for anything. He offers two reasons. First George says that he is relying on the original tender which required completion by the end of August and secondly George is broke. Not only has he lost the $100,000 that he had earmarked for the upgrading of his hotel but is now heavily in debt as result of some disastrous bets on the Perth racecourse.

Advise Bruce of his legal position.

This problem question contains the two discourse units as described by Howe (1990), the Situation (almost the entire question) and the Academic Instruction (the final sentence). Indeed, because the situation component is so long and complicated, the first task in the problem is to isolate the relevant or "material" facts (i.e. the facts that have legal significance) from the irrelevant details and then to proceed to answer the question by treating these material facts and the issues that arise from them in a logical and organised manner.

The lecturer "N" problem question contains a number of elements that are either fundamental or reasonably common additional features of these sorts of texts. Firstly, the situation unit of the question is fundamentally a narrative and contains features typical of this genre with the events basically recounted in the past tense, i.e. what happened or what X did or didn't do; with frequent use of personal reference to link the parties involved; and with many time expressions, such as on Saturday June 11 (line 38) and temporal conjunctions, such as at this moment, when, meanwhile (lines 26, 30, 35), to map out the exact sequence of events; and with a mixture of indirect and direct speech to express the exact words written or spoken by the parties.

In addition, within this framework there is often quite a deal of register shifting and satirical or topical references, the intention and effect of which is undoubtedly humorous. For example, in this problem question the parties to the dispute are two men who are only referred to by their given names, George and Bruce. These are deliberately stereotypical Australian working class names for the hotel-owner who
gambles (George) and the builder with the young family and large mortgage (Bruce). Furthermore, the names of places and institutions (the hotel, suburb, newspaper and racecourse cited) are all either authentic local names or allusions to them, and the renovation of historic Fremantle hotels had become fashionable and was certainly topical when this question was set. The informality created by the use of these names in this scenario and the actual words of dialogue (with colloquial and informal expressions such as OK, and drop a note in the post (lines 24 & 27) and the use of contractions such as can't, I'll, didn't, that's in lines 27, 40 & 43) is in tension with the formality of the general academic and subject-specific (i.e. legal) register, producing an amusing effect.

The lecturer's general description of the characters and the events switches between being reasonably formal with expressions such as a rather dilatory fellow and as a result of an oversight (lines 29 & 20) and much more informal expressions such as George is broke (line 52). This register shifting co-exists also with the more specific legal domain as exemplified by the legal document (the letter of undertaking) that is quoted in the third paragraph. This excerpt bristles with many of the features cited in the literature as typical of 'legalese' such as long and complicated phrases and clauses with qualifications all incorporated into a single sentence; use of uncommon referents such as the same and such (lines 12 and 15); legal lexis and collocations such as consideration, expense incurred, undertake, binding upon; frequent use of any (lines 14 & 16) in order to be all-inclusive; and heavy use of modal verbs and modalised expressions such as shall not, shall, may (lines 12 & 14) and binding upon and bound to (lines 14 & 16). Other expressions which are clearly from the legal register such as entered into a binding contract and in reliance upon this promise (lines 38 & 47) are utilised in the description of the events.

Some of the features discussed above are apparent in the examination problem question (lecturer "G"), the suggested answer to which has been explored in detail above. For example, the actual name of the students' university was used in the question and a new Commerce building was under construction at the time on campus. Kevin Costner's academy award winning film Dances with wolves was also current at the time. The assignment problem question set by lecturer "G" that same semester contained a suitably long and detailed set of events and the principal parties in the dispute were Mr Hok, Mr Kee Ting and Mr Hew Sun (parodies of the former and present Prime Minister's names, Hawke and Keating, and the Opposition Leader's name, Hewson, as the leadership battles were very topical at that time).
5.7 Lecturer “N” text

The complete text of Lecturer “N”’s suggested answer (947 words) to the above examination question is reprinted in the Appendix (see Appendix 5, p. 261). As with the previous texts (Lecturer “S” & “G”), the text was divided into conjunctively related units (CRUs) and the text’s schematic structure, thematic progression and network of conjunctive relations mapped (see Figure 5.8 below).

The lecturer “N” text has a number of curious punctuation choices (as the lecturer “G” text did also) that deserve comment. Halliday (1985c: 32-37) points out that punctuation has three kinds of functions: boundary marking (to separate grammatical units - sentences, clauses, phrases, and words), status marking (to distinguish speech functions and projections - statements, questions, exclamations, quotations and citations), and relation marking (to signify apposition, digression, linkage, possession, and omission). He further suggests (ibid: 36) that there are two basic styles of punctuation - either to punctuate in terms of the grammar, or in terms of the phonology:

Hence, if one is writing connected discourse in English, the punctuation can be thought of (and is unconsciously interpreted) indifferently either as marking off grammatical units or as marking off prosodic units.

The text appears to be punctuated according to grammar but there are six instances of non-standard boundary marking all involving the use of commas (CRUs 2, 4a, 7, 19, 23a, and 41). Four of these, in this author’s opinion, should be punctuated as semi-colons (or even full stops) because they employ conjunctive expressions that are adverbial and are not co-ordinating or subordinating conjunctions in their own right. The blurring of the grammatical distinction between conjunctive adverbs and full conjunctions is a reasonably common occurrence (ranking in frequency with confusion and misunderstanding of the meaning and use of apostrophes in modern English) but the use of the comma in CRUs 7 and 19 to “splice” sentences together (while again a reasonably common writing error) is more significant because of the potential ambiguity that results especially with CRU 20 which could be interpreted as a subordinate clause belonging to either CRU 19 or (much more likely) 20a. In both units 7 and 19, the semi-colon (or full stop) should be employed instead of the comma.

Whether these punctuations are the result of clerical error on the part of the departmental typists who carried out the work for the lecturer or are indeed the choices of the lecturer herself (or a bit of both) is now impossible to ascertain. The lecturer in question certainly considered it important that students correctly followed legal conventions such as the underlining of case names, and the particular style of footnotes used in legal referencing. On the other hand, another historical legal convention is the reduction of
LECTURER "N"

**THEME (italicised)/RHEME**

In order to advise Bruce of his legal position it is necessary to discuss the topics of offer, acceptance and consideration.

These subjects cannot be considered in isolation, rather they must be discussed in the light of the facts as they occur.

**CONJUNCTION**

**INTERNAL**

**EXTERNAL**

1 exp/purp in order to

1a exp/cont

2

exp/simul

rather

3 exp/simul

as

3a

Fact 1

When George advertises in the West Australian he is making an invitation to treat,

Bruce's tender is on [sic] offer.

An offer may be defined as an undertaking - "made with the intention (which may be objectively ascertained) that it shall become binding on the person making it as soon as it is accepted by the person to whom it is addressed".

An invitation to treat is a mere preliminary communication prior to an offer, in other words it invites offers.

Belatedly:

George is not legally accepting the tender when he only makes a mental intention to tell Bruce that he accepts.

Acceptance must be communicated to the offeror to be effective.

The letter of undertaking is an option contract and by signing and returning it to George,

Bruce is bound to keep his offer open for two calendar months.

in other words

exp/simul

when

9

9a

exp/cont

when

10

11 exp/add

and

12 exp/mann

by

12a
Fact 6  
The telephone conversation can be seen either as a request for information, or, more likely as a counter offer.

Fact 7  
George by wanting the work completed by the end of August is adding an additional term to the contract.

Fact 8  
The original offer (i.e. the tender) is destroyed and is replaced by the new counter offer.

Fact 9  
Bruce's reply is a supply of information if George's statements had been a request for information, but, and again more likely, Bruce's reply is a new tender or offer.

Fact 10  
George's reply is too uncertain to constitute acceptance of this counter offer at this stage.

Fact 11  
George's letter of June 10 could be an acceptance, as acceptance is complete on posting a valid contract would exist at noon on June 10. However the postal rule may be displaced if it is unreasonable to use the post as a means of communication in the circumstances.

Fact 12  
An offer may only be revoked before acceptance is completed, thus Bruce cannot escape performance at this stage by saying he was too busy elsewhere.
Fact 13: George's offer to extend the date for completion is a gratuitous offer on his part.

A contract requires consideration to be legally effective and purely gratuitous statements are not legally binding. However in *Central London Property Trust Ltd. v High Trees House Ltd (High Trees)* it was held that a promise intended to be binding, intended to be acted upon is binding.

Fact 13: George's promise to forgo completion until the end of September was intended to be binding.

He expected Bruce to act upon his statement and Bruce by employing extra men and materials did act upon George's promise. George's promise is therefore binding.

However since *High Trees* was decided, subsequent cases have imposed limitations on this principle. These must now be considered.

Rule (i): Until the recent High Court decision of *Walton Stores (Interstate) Ltd. v Maher & Anor* the courts had required that the parties had a pre-existing contractual relationship before the doctrine of High Trees (or promissory estoppel as it is sometimes called) could be used. If no contract existed on June 10, Bruce can rely on *Walton Stores*.
and should be successful in asking the court to keep George to his gratuitous promise.

However, it is more likely a contract did exist

and thus no problem arises.

Secondly, it must be unfair for the promisor, George to go back on his promise.

Bruce can successfully establish this.

Thirdly, it has traditionally been stated that the doctrine is to be used as a shield and not a sword,

in other words promissory estoppel cannot be used as a cause of action.

This requirement may be no longer necessary as a result of the Waltons Stores decision.

However, if Bruce instigates court proceedings,

he will be relying on the contract between himself and George.

If during the proceedings George attempts to rely on the late completion date as an excuse for non payment,

Bruce will defend himself

by using promissory estoppel as a shield.

Fourthly, the representation must be clear and unequivocal.

George's statement was quite plain,

Bruce was being given an extension of time to complete the contract.

Next it may be argued that Bruce relied on George's promise

and would have suffered detriment
if George had gone back on his promise after the extra men and materials had been arranged. Bruce acted and relied on George’s promise by finishing the work by the end of September.  

Rule (vi) Finally it should be noted that the doctrine is only suspensory in nature. The promisor can resume his original position by giving reasonable, but not necessarily formal notice. This does not apply however if the promisee, Bruce, cannot resume his original position as indeed is the case here. Bruce has acted on the promise and completed the alterations by the end of September and thus obviously cannot return to his original position. 

The Walton Stores Case confirms the High Trees principle in Australia. Bruce is safely within the ambit of the doctrine. 

In conclusion it may be stated the Bruce is in a strong legal position. Even if he did not have a valid contract on June 10, (which is unlikely) he should be able to rely on the doctrine of promissory estoppel and thus the court would uphold the promise made by George to forgo completion until the end of September.
punctuation to the absolute minimum in formal legal documents because of the belief that "punctuation marks were too unstable to be relied on - they could be left out in copying, or fraudulently deleted or inserted; and so the ideal text was one that made use of no punctuation at all" (Halliday, 1985c: 38). While the lecturer "N" text is clearly not a formal legal document, its somewhat 'unstable' punctuation appears to reflect the traditional lack of faith in punctuation in legal circles.

Schematic structure

The lecturer's answer to the problem was organised into seventeen paragraphs and encompasses four major sections:

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Subtitle</th>
<th>Paragraph Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>General areas of law</td>
<td>(Forecast/Overview)</td>
<td>1 para.</td>
</tr>
<tr>
<td>2</td>
<td>Law relating to Offer &amp; Acceptance relevant to the problem facts</td>
<td>(Law &amp; Application to Facts)</td>
<td>5 para's.</td>
</tr>
<tr>
<td>3</td>
<td>Law relating to Consideration relevant to the problem facts</td>
<td>(Law, Authority &amp; Appl'n to Facts)</td>
<td>10 para's.</td>
</tr>
<tr>
<td>4</td>
<td>Conclusions</td>
<td>(Opinion)</td>
<td>1 para.</td>
</tr>
</tbody>
</table>

The first introductory section (F/O) outlines the areas of law to be discussed in the answering the problem and indicates that the answer will be organised around the material facts (i.e. the facts with legal significance, a total of 14) of the case "as they occur".

The second section (5 para's) outlines the law concerning offer and acceptance in the formation of a valid contract as it applies to the problem question and deals with the following 12 facts in the order that they occurred in the case: George's ad (line 4, problem question), Bruce's tender (lines 5-6), George's decision to accept (line 7), the letter of undertaking (lines 9-16), Bruce's signing & returning it (line 17), the phone conversation (line 21), the completion date (lines 21-23), Bruce's reply (lines 24-25), George's reply (lines 27-28), George's letter (lines 31-33), "note in the post" (lines 27-28), Bruce "too busy" (lines 36-42). Interestingly, in this section of the text, the application of the law to the facts (F) precedes the discussion of the relevant law (L) for all but the last of the facts listed above, which is a reversal of the typical pattern of moves as outlined by Howe (1990). This is no doubt a direct consequence of the text being organised sequentially around the problem facts, as an examination of the thematic progression of the text reveals (see next section). It is also interesting to note that in this section there is a complete absence of any use of case authority (A, the move which typically follows the enunciation of the legal proposition (L) and precedes its application to the problem facts (F). Again, this is clearly due to the fact that this text
was written with Commerce students (and not Law students) in mind as the notes on the tutors' marking scheme which accompanied this answer attest.\(^1\)

The third section on the topic of consideration and in particular the doctrine of promissory estoppel is a major part of the text (covering 10 paragraphs) but is unlike the previous section in that it is not primarily organised around a sequence of facts but around a legal proposition: the doctrine of promissory estoppel and the six conditions that need to be satisfied before the doctrine can be successfully applied. This section overall mirrors the pattern proposed by Howe (1990) in that the law or legal proposition \((L)\) is generally outlined first followed by the relevant case authority \((A)\) and then the application of the law to the material facts of the problem \((F)\).

The final section consists of a brief one paragraph summary of the conclusions reached concerning Bruce's legal position \((O)\).

**Thematic Progression**

*Figure 5.9* (below) illustrates the pattern of thematic progression in lecturer N's suggested answer. One of the dominant patterns in this text is the thematising of the material facts (given information) of the problem question followed by the legal significance (new information) in the subsequent rhemes which is the unmarked pattern of the structuring of information in English. As mentioned above, the first section of the text outlines the text's method of development according to the "facts as they occur" (unit 3, rheme).

The second section is thus largely organised around these facts as the point of departure of the text (in 9 out of the 12 facts that make up this section, i.e. in CRUs 4, 5, 11, 12, 13, 16, 18, 19, 22) so that there is a major radiating pattern of themes emanating from the rhyme of unit 3 (the end of the first section, the introductory \(F/0\) unit).

The third section of the text commences with the fact of George's promise in theme position (Fact 13 linked to the rhyme of CRU 3) and then proceeds to develop along very different lines to the preceding section. Since this section is almost entirely about the legal ramifications of that promise in the context of all the preceding facts, it is not surprising that the thematic development is so different. This section is largely developed by the "chaining" of rhemes and themes whereby the new information

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\(^1\)The "answer" attached is, in my opinion, the level of detail required for an answer such as this for commerce students. I do not emphasise case names in lectures nor do I go into the detail that would be necessary for law students. By the time the students hand in this assignment I shall have finished lecturing on offer, acceptance and consideration. Students armed with a text book who have attended lectures should be able to write a comparable answer."
Figure 5.9: Thematic Progression (Lecturer "N")

1. "facts as they occur"
2. PROBLEM Q
3. F/O
4. T
5. R
6. F
7. R
8. ""facts as they occur"
9. ""facts as they occur"
10. PROBLEM Q
11. F/O
12. T
13. R
14. F
15. PROBLEM Q
16. F/O
17. T
18. R
19. F
20. PROBLEM Q
21. F/O
22. T
23. R
24. F
25. PROBLEM Q
26. F/O
27. T
28. R
29. F
30. PROBLEM Q
31. F/O
32. T
33. R
34. F
35. PROBLEM Q
36. F/O
37. T
38. R
39. F
40. PROBLEM Q
41. F/O
42. T
43. R
44. F
45. PROBLEM Q
46. F/O
47. T
48. R
49. F
50. PROBLEM Q
51. F/O
52. T
53. R
54. F
55. PROBLEM Q
56. F/O
57. T
58. R
59. F

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contained in the rhemes subsequently becomes the point of departure (the given
information) for later clauses. The material fact of George’s promise begins the first
two paragraphs of this section (CRUs 25 & 29) in unmarked thematic position but the
leading case authorities for the law regarding these types of promises, the High Trees
case and the Waltons case are both in marked thematic position (in a circumstantial
adjunct or an introductory subordinate clause) when they are first introduced in the text
in CRUs 28 & 33, and CRU 35 respectively. So these important cases are given
prominence in the discussion as the leading authorities on promissory estoppel and the
principles they established are developed at length in the rhemes of the clauses of this
section.

Paragraphs three and four of section three begin with these case authorities and the next
five paragraphs utilise internal successive conjunctives (secondly, thirdly, fourthly,
next, and finally, which will be discussed further under conjunction) as the point of
departure (or textual theme) of each subsequent paragraph with the details of the legal
rules arising from the cases elaborated in the rhemes within each paragraph. The
Waltons case begins the final paragraph of this section as unmarked theme.

The final one-paragraph section also utilises textual theme (the conjunctive adjunct In
conclusion).

Conjunction

The lecturer “N” text is probably most distinguished from the other two lecturer’s texts
in its use of conjunction. The three texts are of comparable length but the “N” text
employs far more congruent expressions of conjunction than the other two. It contains a
total of 92 conjunctively related units (not counting embedded clauses as separate units)
and a total of 60 explicit conjunctions and two implicit ones and thus in this respect is a
more “spoken” like text than the other two.

The pattern and distribution of conjunction in this text, however, is remarkably similar
to the other two overall (see Table 5.5 below). For example, disregarding the eleven
“and”s of the text, the “N” text also contains roughly equal numbers of internal and
external conjunction (24 internal and 27 external). This text is likewise dominated by
consequential conjunctive relations which together account for nearly half of the
conjunctive links in this analysis (25 consequentials out of a total of 62). The second
most important type of conjunctive relation in this text is, as found with the previous
two texts, the comparative category (14 comparatives, again roughly about a quarter of
all links) but a significant difference between the “N” text and the other two is its use of
temporal conjunction (a total of 12, including 3 simultaneous and 9 successive conjunctions).

Within the consequential group of conjunctions, the "N" text does show some interesting differences between it and the other two texts. Whereas in the previous texts, consequence (consq) conjunctions were the dominant type of consequentials (representing half of this group) followed by condition (cond) and then concession (cone) conjunctions, the "N" text has equal numbers of consequence and condition (8 each out of 25) and almost as many (7) manner (mann) conjunctions but no examples of concession. The condition and the manner conjunctions are all external while the majority of the consequence links (6 out of 8) are internal.

Table 5.5: Pattern & Distribution of Conjunction

<table>
<thead>
<tr>
<th>LECTURER</th>
<th>Total</th>
<th>consequential</th>
<th>comparative</th>
<th>additive</th>
<th>temporal</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;S&quot; 985 words (CRUs 62)</td>
<td>21 internal</td>
<td>51.2% (n = 22)</td>
<td>25.6% (n = 11)</td>
<td>16.3% (n = 7)</td>
<td>7% (n = 3)</td>
</tr>
<tr>
<td>917 words</td>
<td>17 external</td>
<td>27.9% consq (n = 12)</td>
<td>9.3% simil (n = 6)</td>
<td>11.5% contr (n = 7)</td>
<td>11.6% &quot;and&quot; (n = 5)</td>
</tr>
<tr>
<td>5 &quot;and&quot;</td>
<td>11.6% cond (n = 5)</td>
<td>7% cone (n = 3)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>N = 43</td>
<td></td>
<td></td>
<td></td>
<td></td>
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<table>
<thead>
<tr>
<th>LECTURER</th>
<th>Total</th>
<th>consequential</th>
<th>comparative</th>
<th>additive</th>
<th>temporal</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;G&quot; 840 words (CRUs 51)</td>
<td>15 internal</td>
<td>59.3% (n = 16)</td>
<td>22.2% (n = 6)</td>
<td>7.4% (n = 2)</td>
<td>11.1% (n = 3)</td>
</tr>
<tr>
<td>840 words</td>
<td>11 external</td>
<td>33.3% consq (n = 9)</td>
<td>11.1% simil (n = 3)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1 &quot;and&quot;</td>
<td>14.3% cond (n = 4)</td>
<td>11.1% contr (n = 2)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>N = 27</td>
<td>7.6% purp (n = 2)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>LECTURER</th>
<th>Total</th>
<th>consequential</th>
<th>comparative</th>
<th>additive</th>
<th>temporal</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;N&quot; 947 words (CRUs 92)</td>
<td>24 internal</td>
<td>40.3% (n = 25)</td>
<td>22.6% (n = 14)</td>
<td>17.7% (n = 11)</td>
<td>19.4% (n = 12)</td>
</tr>
<tr>
<td>947 words</td>
<td>27 external</td>
<td>12.9% consq (n = 8)</td>
<td>12.9% simil (n = 5)</td>
<td>17.7% &quot;and&quot; (n = 11)</td>
<td></td>
</tr>
<tr>
<td>11 &quot;and&quot;</td>
<td>12.9% cond (n = 5)</td>
<td>14.5% contr (n = 9)</td>
<td>15.4% susc (n = 9)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>N = 62</td>
<td>11.3% mann (n = 7)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

There appears to be a syllogistic pattern that is particularly evident in the Law and Application to the Facts sections of this text (and also in evidence in the other two texts - see discussion on syllogistic reasoning above) where the legal propositions or material facts are linked typically through subordinating (typically, external) conjunctions like if, as and by while the resulting principles, deductions, or conclusions are linked typically by internal conjunctive adverbs such as thus, therefore, and however or internal coordinating conjunctions like but and so. This pattern can be seen in CRUs 16 & 17, 20 & 21, 23 & 24, 26-28, 31 & 32, 36-38, 52-53, and probably most clearly of all in the concluding section (Opinion) in CRUs 58 & 59.

The surprising frequency of the manner (mann) conjunction by and also the occurrence of external temporal (simul & suce) conjunctions like when, before and after, is no doubt a reflection of the nature of the George and Bruce problem itself with its long and
detailed sequence of legally significant events where dates and timing are important considerations. The subsequent organisation of the answer to this problem around the "facts as they occur" thus clearly necessitates relating the actions of the parties (i.e. manner conjunction) and the sequence of events (temporal conjunction) in terms of their legal consequences.

Another prominent feature is the use of the 5 internal successive (succ) temporal conjunctions secondly, thirdly, fourthly, next, finally in the third section on the doctrine of promissory estoppel to scaffold this part of the text. After presenting the general rule or basis of the doctrine (L) and the case authority (A), the text examines the qualifications and restrictions that have been enunciated in later cases. Each internal successive conjunction marks the beginning of a new paragraph that develops the legal principles and requirements (L) of the promissory estoppel doctrine. Six rules (Rules i - vi) are presented and all but the first are introduced in this way. The result is a tightly organised discussion of a complex legal area.

Thus, both internal and external conjunction overall play a very important part in the development of this text as their abundant use would suggest.

Voice

Another textual feature which is noteworthy is the choice of passive voice at the rank of the verbal group. Passive voice has been utilised in a total of 28 verbal groups in this text (in CRUs 2, 3, 6, 10, 12a, 13, 15, 15a, 21, 13, 23a, 28, 29, 33, 34, 35a, 41, 42, 48, 49, 49c, 51, 57). By far the majority of these passives (18 out of 28) occur in units that outline the relevant law (with or without case authority). The passive voice enables a legal concept such as offer (CRU 6) or acceptance (CRU 10) to occupy subject position (and often unmarked theme or point of departure of the message) and the legal rules or principles established for that concept to be outlined with the option of omitting agency altogether. The focus is on what the rule or principle is (iL) and not on any of the individuals involved in the legal process. The remainder of the passives in the text nearly all (7 out of 10) occur in the clauses that apply the law to the problem facts (F) and likewise are usually agentless propositions in which the focus is on the legal results of the actions of the parties such as the original offer (CRU 15) and George's promise (CRU 29). The majority (15 out of 28) of the passives also are modalised, that is, they have a finite modal verb (usually either modulations of obligation, which predominate in the clauses on the relevant law -L, or modalizations of probability). Modality will be discussed further below after the following brief discussion of three important ideational
features: the tense of the verbal groups, modification of the nominal groups, and the lexical content; and finally, the lexical density of the text.

Tense, Modification, Lexical ‘Content’ and Density

The patterns of tense in the verbal groups are similar to those revealed in the preceding two texts that have been analysed. Without considering the extensive use of modal verbs here, the basic pattern is for the sections of the text that state the relevant law (L) to be predominantly in the present tense (“the law is...”), sections that give case authorities (A) to contain a mixture of tenses (past and perfect tenses), and the sections of the text that apply the law to the facts of the problem (F) to be predominantly expressed in the past tense with the conclusions reached and the final opinion (O) usually modalised.

There are two examples of emphatic affirmatives in the text - did act (CRU 31a) and did exist (CRU 37) - which are both used in the logical reasoning of applying the law to the facts of the problem (F). These highlight the adversarial or contestable nature of the law around the points at issue: whether in this case Bruce did or did not act on George’s promise, and whether a contract did or did not actually exist.

Table 5.6: Classifier-Thing

<table>
<thead>
<tr>
<th>Legal Position</th>
<th>CRU</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preliminary communication</td>
<td>(7)</td>
</tr>
<tr>
<td>Mental intention</td>
<td>(9a)</td>
</tr>
<tr>
<td>Option contract</td>
<td>(11)</td>
</tr>
<tr>
<td>Calendar months</td>
<td>(12a)</td>
</tr>
<tr>
<td>Telephone conversation</td>
<td>(13)</td>
</tr>
<tr>
<td>Counter offer</td>
<td>(13, 15a, 18)</td>
</tr>
<tr>
<td>Valid contract</td>
<td>(20a, 58)</td>
</tr>
<tr>
<td>Postal rule</td>
<td>(21)</td>
</tr>
<tr>
<td>Gratuitous offer</td>
<td>(25)</td>
</tr>
<tr>
<td>Gratuitous statements</td>
<td>(27)</td>
</tr>
<tr>
<td>High Court decision</td>
<td>(35)</td>
</tr>
<tr>
<td>Contractual relationship</td>
<td>(35)</td>
</tr>
<tr>
<td>Promissory estoppel</td>
<td>(35a, 42, 45b, 58a)</td>
</tr>
<tr>
<td>Gratuitous promise</td>
<td>(36b)</td>
</tr>
<tr>
<td>Court proceedings</td>
<td>(44)</td>
</tr>
<tr>
<td>Completion date</td>
<td>(45)</td>
</tr>
<tr>
<td>Reasonable notice</td>
<td>(52a)</td>
</tr>
<tr>
<td>Formal notice</td>
<td>(52a)</td>
</tr>
</tbody>
</table>

The lecturer “N” text demonstrates the prominence of classifiers in the nominal groups of this type of legal discourse. Table 5.6 (above) lists 24 nominal groups that contain classifiers. This is a similar result to that of the previous two texts and illustrates that the law is very often concerned with classifying things (actions, events and concepts) into discrete categories and the legal consequences that pertain to or arise from these.
An examination of the lexical content of the text reveals similar features to the previous two texts in that there is a taxonomic organisation of the field-specific legal lexis in the text. For example, in connection with the first two topics of the text, offers and acceptances are distinguished from invitations to treat, requests for information, and counter-offers. Similarly, the parties involved are distinguished in legal terms in a variety of ways related to their legal conduct such as offeror (Bruce), promisor (George), and promisee (Bruce). Furthermore, contracts are determined to be valid, binding, and legally effective or not while promises and statements can be gratuitous or not and also binding or not. It is interesting to note that this text contains examples of some of the more noticeable characteristics of legal English such as the use of archaisms, latinisms, and the unusual legal meanings of everyday words such as consideration, invitation to treat, promissory estoppel. There are also many instances of noun–verb legal collocations such as instigate proceedings (CRU 44), escape performance (CRU 24), suffer detriment (CRU 49a), and uphold the promise (CRU 59) in this text. The adjective reasonable also appears in this text on several occasions (CRUs 21a, 22a, 52a).

The lexical density of the “N” text was also calculated (as per Halliday, 1985c) by adding the number of purely lexical items and dividing this figure by the number of clauses (ignoring embeddings). This revealed a total of 385 lexical items over 92 clauses and a lexical density of 4.2 which, although slightly less than the other two texts (“S” 5.5 & “G” 6.3 respectively), still locates the “N” text firmly within the expected range (“somewhere between 3 and 6 depending on the level of formality of the English”) compared to spoken discourse which has a typical density of between 1.5 and 2 (ibid: 80). The “N” text has a lower lexical density than the other two because it so consistently employs congruent realisations of conjunction for the logical relations of the text (60 explicit conjunctions over 92 clauses compared to 37 and 26 explicit conjunctions over 62 and 51 clauses in the “S” and “G” texts respectively, all three texts being of comparable word length) and so in this sense is a more “spoken-like” text than the other two.

**Modality**

Modality is a significant feature of the “N” text and an examination of its pattern and distribution (see Table 5.7 below) revealed similar results to those of the previously analysed texts. Modality is realised nearly always as either modulations of obligation or modalizations of probability and appears in the text predominantly in the application of the law (F) sections and the final advice (O). As with the previous texts, disregarding metaphorical expressions of modality, modalizations predominate over modulations (as
Maley, 1989: 82, also found in her analysis of legal judgments) and they are mostly expressed in congruent forms as finite modals (19 modalizations of probability out of 34 modal verbs).

Table 5.7: Modality (Text “N”)

<table>
<thead>
<tr>
<th>Finite Modals</th>
<th>Modality (Mo)</th>
<th>CRU</th>
</tr>
</thead>
<tbody>
<tr>
<td>cannot be considered</td>
<td>Mu(h)</td>
<td>(2)</td>
</tr>
<tr>
<td>must be discussed</td>
<td>Mu(h)</td>
<td>(3)</td>
</tr>
<tr>
<td>may be defined</td>
<td>Mo(l)</td>
<td>(6)</td>
</tr>
<tr>
<td>may be ascertained</td>
<td>Mo(l)</td>
<td>(6)</td>
</tr>
<tr>
<td>should become</td>
<td>Mo(m)</td>
<td>(6)</td>
</tr>
<tr>
<td>must be communicated</td>
<td>Mu(h)</td>
<td>(15)</td>
</tr>
<tr>
<td>can be seen</td>
<td>Mo(l)</td>
<td>(13)</td>
</tr>
<tr>
<td>could be</td>
<td>Mo(l)</td>
<td>(19)</td>
</tr>
<tr>
<td>would exist</td>
<td>Mo(m)</td>
<td>(20a)</td>
</tr>
<tr>
<td>may be displaced</td>
<td>Mo(l)</td>
<td>(21)</td>
</tr>
<tr>
<td>would drop</td>
<td>Mo(m)</td>
<td>(22)</td>
</tr>
<tr>
<td>may be revoked</td>
<td>Mu(l)</td>
<td>(23)</td>
</tr>
<tr>
<td>cannot escape</td>
<td>Mo(h)/Mu(h)</td>
<td>(24)</td>
</tr>
<tr>
<td>must be considered</td>
<td>Mu(h)</td>
<td>(34)</td>
</tr>
<tr>
<td>could be used</td>
<td>Mu(l)</td>
<td>(35a)</td>
</tr>
<tr>
<td>can rely</td>
<td>Mu(*)/Mu(l)</td>
<td>(36a)</td>
</tr>
<tr>
<td>should be</td>
<td>Mo(m)</td>
<td>(36b)</td>
</tr>
</tbody>
</table>

(b) Other Modal Expressions (including Metaphorical realisations)

<table>
<thead>
<tr>
<th>Other Modals</th>
<th>Modality (Mu)</th>
<th>CRU</th>
</tr>
</thead>
<tbody>
<tr>
<td>necessary</td>
<td>Mu(h)</td>
<td>(1a, 43)</td>
</tr>
<tr>
<td>binding</td>
<td>Mu(h)</td>
<td>(6, 27, 28, 29, 32)</td>
</tr>
<tr>
<td>bound</td>
<td>Mu(h)</td>
<td>(12a)</td>
</tr>
<tr>
<td>likely</td>
<td>Mo(m)</td>
<td>(13, 17, 37)</td>
</tr>
<tr>
<td>uncertain</td>
<td>Mo(l)</td>
<td>(18)</td>
</tr>
<tr>
<td>probably</td>
<td>Mo(m)</td>
<td>(22a)</td>
</tr>
</tbody>
</table>

(a) implicit/subjective realisations (i.e. modal verbs)

<table>
<thead>
<tr>
<th>Modulation (Mu)**</th>
<th>low median high</th>
</tr>
</thead>
<tbody>
<tr>
<td>low</td>
<td>1</td>
</tr>
</tbody>
</table>

(b) other modal expressions

<table>
<thead>
<tr>
<th>Modulation (Mu)**</th>
<th>low median high</th>
</tr>
</thead>
<tbody>
<tr>
<td>low</td>
<td>1</td>
</tr>
</tbody>
</table>

** modulations of potentiality, i.e. Mu(*) not included
As was the case with the “S” and “G” texts, modalizations of probability were predominantly of median and low value (14 and 10 respectively out of a total of 26 for the text), i.e. signifying what is probably true and what is possibly true concerning the legal matters under discussion. Similarly, expressions of obligation, on the other hand, were virtually always realised as outer values, i.e. either high obligation (what must be done or is required - a total of 21 cases) or low obligation (what may be done or is allowed- in 5 cases). It would therefore appear that the assigning of rights and duties in the law is much more clear-cut than predicting the likely success of a claim or the legal outcome when applying the law to a set of facts.

A number of the modalities in this text are ambiguous as was found also with the previous texts, especially the lecturer “S” text. For example in CRU 24, cannot escape can be glossed as either probability (Bruce certainly will not escape) or as obligation (Bruce will not be allowed to escape) and can rely in CRU 36a can be interpreted as Bruce is able to rely (i.e. modulation of potentiality) or Bruce will be allowed to rely (i.e. modulation of obligation).

While the modal finites are all regarded as being implicit subjective realisations of modality (see Table 3.5) and are the main expressions utilised in the “N” text, the other expressions of modality (see Table 5.3 (b) above) mostly fall into the objective category. These include modal adjuncts of probability such as obviously, likely, unlikely, and probably, which are classed as being implicit objective, and modal adjectives such as uncertain and necessary that fall into the explicit objective category. Furthermore, none of the three texts use explicit subjective modality such as I think and in my opinion which Maley (1989) found to be a significant feature of judicial discourse. This would appear, then, to be one clear difference between legal writing in academe (at least with legal problem questions) and that of the legal judgment.
DISCUSSION

5.8 Legal problem questions

Legal problem questions, whether they be set for tutorial discussion, examinations, or assignments, contain two basic components or "units of discourse": the Situation (the facts of the problem) and the Instruction (the academic instruction as to the task to be performed). The Situation component is a narrative which typically is mainly written in the past tense and utilises personal reference for the disputing parties. It may be very long and complicated with many facts or details and temporal phrases and conjunction to order the sequence of events. The Situation may also include a mixture of direct and indirect speech to express the words used by the parties in the dispute. There may also be a degree of register shifting in the text with satirical or topical references and allusions (e.g. the use of authentic names as well as parodies) and more informal lexis co-existing with language that is much more formal and specific to the legal domain.

5.9 Answers to legal problem questions

Schematic Structure

The analyses of the three lecturers' texts confirm the schema proposed by Howe (1990): Forecast/Overview (F/O), Issue (I), Law (L), Authority (A), Application to Facts (F), Opinion/Advice (O) and the four stages or moves outlined by Gaskell (1989): Problem/Issue, Proposition, Authority, Application. Some of these would appear to be optional to some extent depending on the context (area of law and type of problem, intended audience etc.) but it is clear that the "central nucleus" (Howe, 1990: 231) of this type of discourse is the Law, Authority, Application to Facts group of moves.

This is the usual sequence but variation is possible. For example, for the purposes of commerce students as opposed to law students, authorities may not be required for every legal proposition advanced (as can be seen in the three texts analysed and in the comments of lecturer "N" footnoted on p. 162). The Authority (case or statutory) may precede the statement of the Law but for case law it usually follows the general legal proposition or principle either in a "parenthetical" way (see CRUs 11 and <19> of the Lecturer "G" text) or by using a "locative" reference usually with in and commonly also as marked theme (see CRUs 20 and 24 of the "S" text and CRU 28 in the "N" text).

The Application to Facts move may also precede the Law as it mostly does in the

---

1 Howe (1990: 228) notes that it is more common for references to statutory authority to precede the statement of law which is usually contained in the same sentence while the order is normally reversed for case authorities: "The statement of law is given first and then the case reference".  

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second section of the lecturer "N" text as a direct consequence of the question itself which predisposes an answer organised sequentially around the problem facts.

It would also appear that there are two main ways that problem question answers are structured: either around the issues of law that arise from the facts of the problem (as in the lecturer "S" and "G" texts) or around the facts of the problem "as they occur" (as in the lecturer "N" text). The former type, naturally, necessitates the Issue unit as its starting point whereas the latter favours Forecast/Overview. The second overarching organising principle is that legal propositions tend to move from the general to the specific. The general area of law is enunciated first followed by the general rule and its specific exceptions or qualifications followed by specific examples as case authority. This can clearly be seen in the lecturer "S" text but is apparent in the other two texts as well.

Because problems frequently contain several issues to be resolved, the central nucleus of schematic units is recursive. Thus, the Issue, Law, Authority, Application to the Facts stages may be repeated until all the issues have been addressed and then the final Opinion/Advice offered. The Application to the Facts stage may involve the making of explicit assumptions as in the Lecturer "S" text because insufficient information is given in the problem question. It may also include the exploration of alternative possibilities or positions (see lecturer "S" text). This latter point highlights the "dialectic nature of the law" and the idea that the final Opinion offered is nowhere near as important as the process of legal reasoning itself whereby alternative arguments are examined and evaluated against existing legal principles and authority.1

Finally, the legal problem question and its answer conforms with the Situation - Problem - Solution macro-discourse structure described by Jordan (1980) and Hoey (1983) as underlying many texts. In addition, the recursive central nuclei of schematic units described above frequently contain within them deductive reasoning patterns, syllogisms, which utilise parallelism and conjunction (explored further below under textual features). Although legal argument is said to be a combination of analogical, inductive, and deductive reasoning, legal problem question answers (at least at the first year level) appear to be predominantly based on traditional deductive logic.

1There is sometimes difficulty in separating the Opinion stage from the Application of the law to the Facts stage. This is because the O stage necessarily involves and is a logical consequence of the F stage. In these analyses, the O stage represents the final statement of opinion or conclusion on an issue as opposed to intermediate conclusions in the process of legal reasoning (i.e. F). The O stage is typically signalled by consequence conjunctions such as therefore and modalised (usually median value modalizations of probability such as would).
Textual Features

Because legal problems are about disputes between people, long human chains involving the parties in the dispute and extensive use of pronominal reference are a feature of these texts. The reference chains involving the contract and its contents and the events leading to the dispute are also significant, but usually range over shorter discrete stretches of the text mostly in the Application to the Facts stage. The demonstrative referent the is frequently used, but comprehension problems may arise for some students, particularly second language ones, with the use of the generic the chiefly in the Law stages to refer to all "infants" or "contracts" as in the lecturer "S" text in contradistinction to the anaphoric reference the to refer to the infant and contract of the problem question. Another important referent is the demonstrative this, which is frequently thematic linking paragraphs and shorter sections of the text. In addition, the comparative such, as has been previously noted, is much more frequent in the legal domain.

Because the legal problem chiefly involves employing detailed legal reasoning in order to "solve" the problem and advise the client, the dominant category of conjunction is clearly the consequential category realised as consequence and condition conjunction (and to a much lesser degree concession, purpose, and manner conjunction). The second most important category of conjunction is the comparative category (contrast and similarity conjunction) indicating that comparing and contrasting are also important components of the process of legal reasoning. In problems that involve long and detailed sequences of events where dates and timing are crucial, temporal and manner conjunction may play a much more significant role such as in the lecturer "N" text which is organised around the "facts as they occur". Overall, the syllogistic pattern that predominates is for the main premiss to be a statement of Law and its Authority, the minor or subordinate premiss to involve Application of the Law to the Facts which may include a condition, consequence or comparison, and the conclusion or Opinion which is introduced by a consequence conjunction such as "thus" or "therefore".

There are roughly equal amounts of internal and external conjunction with the former playing an important part in constructing and developing the framework of the text. For example, internal conjunctions are prominent at paragraph boundaries as the use of internal temporal conjunction to scaffold the discussion of the Law of promissory estoppel and its Application to the Facts in the lecturer "N" text vividly demonstrates. The interplay between external and internal conjunction is seen in the syllogisms of the Law/Authority, Application to the Facts, and Opinion stages. The legal propositions (Law) or material facts (Application to the Facts) are linked typically through external
subordinating conjunctions (such as "if", "as", "by") while the resulting principles (Law), deductions or conclusions (Application to Facts or Opinion) are linked typically by internal conjunctive adverbs or co-ordinating conjunctions (such as "thus", "therefore", "however"; or "but" and "so").

The dominant means of lexical cohesion in these texts is repetition and parallelism. The lack of use of synonymy and other lexical devices relates no doubt to the technical nature of much of the lexis and the need for precision and the avoidance of ambiguity in classifications and definitions. Repetition and parallelism play an important part in cohesion between paragraphs and in the deductive syllogisms of these texts which often involve parallel grammatical structures and the repetition of whole phrases in the steps of the reasoning, especially in the Law and Application to the Facts stages.

The thematic progression in the texts analysed is achieved predominantly by the "chaining" and "radiating" of rhemes to subsequent themes. There are far fewer "looping" and "leap-frogging" links from theme to theme. The links are mostly by simple lexical repetition or reference and usually involve the central concepts of the problem (contracts, damages, legal rules, principles or issues) or the parties in the dispute. Where leading cases are introduced, they are often in marked theme position (in the "S" and "N" texts, for example). Some marked themes incorporate parallelism and reference and also mark paragraph and schematic structure boundaries. Where texts are organised according to the facts (as in the "N" text), the dominant pattern is for the themes to largely contain exophoric reference to the facts of the problem question (the given information) as their point of departure followed by the legal significance of those facts (the new information).

Passive voice is employed to a significant degree in these texts (roughly a quarter to a third of the conjunctively related units contain passives). Voice is an important resource which allows choices in mapping the grammatical subject and the various participants of the clause. The use of passives in these texts is usually to allow the thematic focus to be on the events or ideas (decisions and principles of law or rights and obligations of the parties) and not on the the person or agent responsible for that event or idea. The majority of the passives occur in the Law (and to a lesser degree the Application to the Facts) stages of the texts and agency is nearly always omitted. A number of passives are also modalised which will be discussed further below.

The texts contain quite a number of qualifiers (finite and non-finite embedded clauses) in their nominal groups and concomitant exophoric reference ("the" referring forward within the nominal group), features which accord with other legal texts such as legislation.
where embedding is very significant. Similarly, the texts display a reasonably large number of noun-verb collocations, the majority of which would appear to be specific to the legal register.

**Ideational Features**

The verbal processes of these texts are overwhelmingly Relational and Material with only a relatively small number of Verbal and Mental processes apparent. Relational processes slightly predominate over Material ones in these texts in accord with an acknowledged feature of expository texts across academic disciplines, the reduction of the verbal group to a linking or relational function with the main experiential content being carried in the nominal groups. The large number of Material processes relates to the concrete facts and events of the problem as well as the legal processes, many of which contain traditional metaphors such as "to be held to a contract", "avoid a contract", "escape liability", "to draw the line", reflecting of the antiquity of the law.

Negative Polarity seems to be a noteworthy feature of these texts with a number of double negatives in evidence. Several propositions and concepts are defined and determined by what they are not.

The tenses of the verbal groups in these texts show consistent patterns which reflect the schematic structure. The first three schematic units Forecast/Overview, Issue, Law are in the simple present tense, stating what the issues are or enunciating what the law on the topic is. Issues are mostly expressed either as direct or indirect questions (typically with "whether"), as in the "S" text. The Authority stage is usually in the past tense for what the court decided in another relevant case. The Application to the Facts stage is mostly in past tenses: the simple past or the present perfect because this stage refers to the facts and events of the problem and the implications of what one of the parties did or has done. This stage is also marked by considerable modality within the verbal group to express varying degrees of certainty (i.e. modalization) about the legal outcomes. The final Opinion stage is also invariably modalised.

Another feature of these texts is the frequency of classifiers within the nominal group. Classification is an important concern of the law and thus the experiential meaning of these texts. The law is concerned with classifying actions, events, and legal concepts into discrete categories and the legal consequences that flow from them. Some of the classifiers are somewhat vague words like "reasonable", "ordinary", "special", which enable a certain flexibility in the law for changing circumstances and social values.
Some prepositional expressions in these texts appear to be specific legal collocations such as *enforceable by and against the infant, fall within the limb, as to, and but for*. Thus, turns of phrase or usages from the statute books or the courtroom (i.e. related legal genres) are also incorporated into this type of discourse.

The lexis in these texts is a combination of technical and specialised legal vocabulary and jargon and more general non-subject-specific academic and non-academic lexis, with the former predominating. The vocabulary is organised taxonomically (i.e. types of contracts and damages) and some legal terms like *capacity* and *consideration* are everyday words with specialised legal meanings. There are also other features such as archaisms (e.g. *estoppel* from old French) and doublets (e.g. *null and void*) which are unique to the legal domain.

**Interpersonal Features**

These texts are, apart from the occasional interrogative, completely in the declarative mood. The interrogatives and also indirect questions (typically with *whether*) are predominantly features of the *Issues* stages of these texts.

There are very few attitudinal markers, comment adjuncts and colloquialisms evident in these texts and thus the vocabulary is consistently formal and impersonal in tenor. In this respect the texts are in keeping with the usual style of academic writing across disciplines in being “objective” and “detached”.

The one significantly different feature in the three texts is in the use of person. The “S” text contains interesting shifts between first, second and third person and in this respect is clearly simulating aspects of a lawyer-client interview where in the final stages of that text the client is addressed directly and given the “lawyer’s” considered professional *Opinion* regarding his/her legal position. The use of the first person is in accord with the judicial tradition of legal judgments in which the judge explicitly interprets the law “as I see it” and although written, maintains the conventions of interactive spoken discourse (Maley, 1985, 1989). The “G” and the “N” texts, on the other hand, are more consistent in tenor (third person throughout) in keeping with the generally impersonal, “objective” style of academic writing across disciplines.

Modality is an important feature of legal problem question answers. The main types of modality are modulations of obligation regarding the rights and duties of the parties and modalizations of probability to express the varying degrees of certainty about the facts and their legal outcomes. Modalizations are usually more numerous than modulations and are located primarily in the *Application to the Facts* and *Opinion* stages of these
texts with modulations being more predominant in the Law stages. There is some inherent ambiguity in the meaning of some modals in these texts as is true of modals in other contexts as well (Lyons, 1977; Leech and Coates, 1983).

Modality is most commonly expressed in these texts through modal finite verbs, many of which (as noted above) are in verbal groups in the passive voice. Modal finites are regarded by Halliday (1985a) as being implicitly subjective but apart from the modal verbs nearly all other modal expressions (modal adverbs and metaphorical expressions of modality) are in the objective category. These legal problem texts are thus in contrast with the traditions of the legal judgement where explicitly subjective modal expressions such as I think and in my opinion are a feature (Maley 1985, 1989).

There were a number of examples in the “S” text of the intertwining of modulation and modalization that has been described as a characteristic modality pattern of legal judgments. According to Maley (1989:82), statements of modulation are typically preceded (“prefaced by or qualified by”) by modalizations in the reasoning of legal judgments. This pattern, while in evidence in the Application to the Facts and Opinion stages of the “S” text, was not readily apparent in either of the other two texts however.

Lastly, modulations of obligation are consistently expressed as outer values (i.e. either high or low) while modalizations of probability are virtually always median or low expressing what is probably or possibly true. This indicates that the rights and obligations as set out in law are basically clear and precise, i.e. what one must or is required to “do” (high or low values), while the application of law to different sets of facts is far less certain, i.e. the likely success or outcome of a case or legal claim is normally expressed in terms of what is probably or possibly true (median and low values). These results are consistent with the modality choices that Korner (1992) discovered in her analysis of solicitor-client interviews and with those found by Maley (1989: 82) regarding legal judgments (apart from the expression of subjectivity):

Judgments contain overall, more individual expressions of opinion, more inferential possibility and necessity, more conditionality than they do the laying of obligations and the granting of permission. This in itself is surprising to those who think of the law as essentially certain, impersonal, and authoritative.

5.10 Legal problem question genre

The answers to legal problem questions constitute a class of communicative events, the communicative purposes of which are to propose legal “solutions” to the problem at hand by the application of legal reasoning. As the discourse community involves legal professionals (lawyers, law lecturers) and student novices learning the art of legal
reasoning, other communicative purposes involve both learning and assessment. These problem questions are both learning exercises and tools for evaluating students' ability to understand and apply legal concepts and to think and reason like a lawyer. The student aims to convince the reader of his/her knowledge of the law relevant to the case at hand and the soundness of the reasoning and logic used in arriving at the opinion or conclusions reached (the "solution").

While there is some variability in individual texts as exemplars of the genre, the foregoing discussion (chapters 4 and 5) has established in some detail the constraints on allowable content, positioning and form. The necessity to demonstrate knowledge of the field and "solve" the problem constrains much of the discussion to the elaboration and application of the technical and specialised legal terms and propositions directly relevant to the facts of the problem under discussion, and to providing relevant case and statutory authorities for those propositions. The legal reasoning process involves the use of primarily consequence and condition conjunction and to a lesser extent similarity and contrast conjunction and frequently the use of deductive syllogisms. Because the purpose of the reasoning is to reach some conclusions and offer a professional opinion on a "client's" legal position, considerable expressions of modality are features of these texts: modulations of obligation and necessity (mostly strong or outer values) and modalizations of probability (mostly more equivocal or median values). The legal problem question is distinguished by members of the discourse community from other types of assignment or examination task such as the writing of case notes, or the writing of legal essays (see Gaskell, 1989) and forms a very significant part of the assessment for the course Principles of Commercial Law.

The generic structure of answers to legal problem questions or in Hasan's (1985) terms the generic structure potential of these texts can be represented as follows:

\[(F/O)^\{(I)(L\cdot(A)\cdot F)^\{O\}\}^n\]

where (after Hasan, 1978):
- * = mobility
- ( ) = optional elements
- \(^\wedge\) = fixed order
- \(n\) = recursivity
- ( ) = scope of recursivity
- [ ] = scope of mobility

and F/O represents the Forecast/Overview stage, I the Issue(s), L the relevant Law, A the Authority for the law, F the Application of the law to the problem Facts, O the final Opinion or Advice.
A case could also be made for an equally valid alternative representation along the lines of Swales (1990) and Bhatia (1993) for a four move structure as follows:

**Move 1:** Delineating the essential legal issues and focus

(i) Forecast/Overview of areas to be covered

&/or (ii) Issues to be addressed

**Move 2:** Stating the relevant law and its authority

(i) Law

(ii) Authority for the Law

**Move 3:** Applying the law to the Facts of the problem

**Move 4:** Stating Opinion/Advice

Bhatia (1993: 90) comments on the difficulties in separating moves because of the syntactic flexibility of the English language so that one move may be embedded within another. Moreover, while “the ultimate criteria for assigning discourse values to various moves is functional rather than formal” (p. 87), it may also be somewhat difficult to determine moves from sub-moves as the discussion by Bhatia (1993) on the research article introduction indicates. With these difficulties in mind, he stresses the importance of knowing “which moves the authors conventionally make in order to realise their communicative purpose(s) effectively and the relative importance of these moves” (p. 86).

The lecturer who wrote the examination question analysed above (“G”) gives an indication of the process he recommends in answering problem questions in notes1 he wrote to staff about students’ generally poor performance on the mid-semester test in C165, which was the students’ first attempt to write in this genre. The lecturer commented on the fact that many students “sacrificed marks” by poor use of case authority (or for some, a failure to “use case authority at all”) as well as confusion as to how to approach the solving of legal problems.

Apparently, many students had adopted the headings used for case notes, which they were quite familiar with from the overheads of notes on leading cases they were presented with in the course lectures, failing to realise that this was another (although certainly related) genre entirely derived from the legal judgment. Lecturer “G” wrote that:

1 A short problem question and a short essay question comprised the test and the lecturer wrote suggested answers to these questions followed by “Some general comments about the test.”
They tried to solve Jack's problem using the following format:

**FACTS**

**ISSUE**

**DECISION**

**RATIO**

The recommended approach is:

A. Identify area of law

B. State principles of law including discussion of cases/statutes that are authority for the rules of law stated.

C. Identify material facts

D. Apply law to the material facts - very important to objectively state the alternative arguments as raised by the facts.

E. Conclude.

The above approach, however, is centred around areas of law rather than issues which Enright (1987: 347) stresses “are the very essence of the problem question”. Davis (1994; personal communication) affirms this and observes that problem questions in law are typically long and detailed scenarios which are carefully “worded with developing the issues in mind” and that “spotting the issues is part of the students’ task”. The centrality of issues is also revealed by Davis’s comments about marking and structuring answers to problem questions in law. This law lecturer assigns marks differentially according to the importance of the issues that the student has identified and discussed and recommends that students structure their answers starting with the most important issues, which was also the pattern used by lecturer “G” in his suggested answer to the exam question discussed in this chapter. Howe (1990: 223) concurs stating that “the issue is the most important part of the students’ answer for it displays an ability to perceive what the problem is, what the court will have to decide”.

As outlined in chapter 2, in their handbook for students, Crosling and Murphy (1994: 127-8) propose the following tentative “model or formula” for answering legal problem questions:

1. stating the known;
2. raising the issue;
3. citing a case;
4. stating the rules, principles or statutes;
5. stating the facts and analysing them in terms of 2 and 4;
6. coming to an opinion; and
7. if appropriate, stating a remedy.
The present study basically agrees with the above (apart from the first unit of the "formula" and the citing of case authority before the stating of the relevant law), which also lists issues and authority as separate units.

Other legal writers such as Gaskell (1989: 79) in advising students on answering legal problems make strong claims for the importance of citing legal authority:

The form in which you should write is that adopted by the textbook writers. You should state a proposition of law; you should give the authority for that proposition; and you should then apply that proposition. Always check to see that you have Proposition (1); Authority (2); and Application (3). For example, 'An offer may be made to all the world (1) (Carlill v Carbolic Smoke Ball company) (2). In the present case ...(3)'.

Gaskell (1989: 79-80) later includes the stating of the issue or problem to be resolved as the first step in answering legal problem questions more fully:

A fuller way of presenting the argument would be (1) Problem / issue; (2) Proposition; (3) Authority; (4) Application. That is, you could first present the problem or issue that arises. In the example given ... the words 'An offer ...' could be preceded by, 'The issue is whether an offer has been made to the offeror individually or whether it is addressed to an indeterminate class of persons ...'

These extracts and quotations, apart from Howe and Crosling & Murphy, are from lawyers or "experts" in the genre and lend support to the importance of each of the stages as outlined above being recognised as generic units in the answering of legal problem questions.
EXAMINATION PROBLEM QUESTION

The exam question was as follows:

M. University contracted Cosner Constructions Pty Ltd (CC) to build a new Commerce building on the south side of the campus. The contract specified that it should be completed and ready for occupation by February 1992. In fact it was not ready until February 1993.

M. University claims that CC should be liable for the following:

(i) $500,000 for erecting temporary accommodation on the campus,
(ii) the extra $200,000 it cost to furnish the building due to the exorbitant inflation rate over the 12 month period.
(iii) $200,000 to compensate the Commerce students for the frustration and disappointment of not being in the building earlier. And also for the loss of enjoyment in missing out on the use of the new lecture theatres for 12 months.
(iv) $50,000 for the loss in staff morale, and
(v) $100,000 as punishment to discourage builders from breaking deadlines in the future.

Advise the University of the likely success of these claims? (sic)

6.1 Student “A”

Student “A” wrote a 460 word answer (in 11 paragraphs) to this question which is reprinted in Appendix 6 (p. 263). The student’s answer was divided into conjunctively related units (a total of 32), the rhemes and themes identified, the schematic structure mapped, and the network of conjunction charted as per the lecturers’ texts in the previous chapters (see Figure 6.1 below).

Content

Regarding the content of the student “A” answer, there is relevant content but also a significant amount of irrelevant content in this answer. For example, units 2 to 9a are not at issue in this case (i.e. the first area or "issue" identified by the student in unit 1 is a non-issue). More significantly, most major points of law relevant to this case are either not addressed at all or are not addressed clearly and adequately. For example, the lecturer’s suggested answer (see chapter 5, pp. 114-122) lists four main areas or issues to be discussed: the different types of damages (pecuniary, non-pecuniary, and punitive), the principle of remoteness, the issue of causation, and the issue of mitigation. The student did not explicitly name any of these terms or concepts but did
describe (but again not naming the cases in question) the two leading case authorities for two of the areas of the problem. He attempted to discuss the leading case with regard to claiming non-pecuniary damages (Jarvis v Swans tours), and the seminal case for the remoteness principle (Hadley v Baxendale). The precedents or legal propositions and principles that these cases established were not successfully enunciated however, and so the all important task of the demonstration of legal reasoning (applying the relevant legal propositions to the facts of the problem) was not achieved.

So, not surprisingly for the lowest scoring answer, its main deficiency is clearly not enough accurate and intelligible content. Interestingly, this student does happen to reach mostly correct conclusions (4 out of 5) regarding the university’s legal position, but because the reasoning is either incorrect or very poorly developed, the student does not score many marks.

Language

It is clear that this student’s English language proficiency is a major obstacle to adequately expressing his ideas and has no doubt hindered his comprehension of many of the concepts of the course. There are major syntactical problems that this student displays (understanding of tenses, sentence fragments and punctuation, morphology - especially verb endings, pronominal and subject-verb agreement etc.) as well as problems on the lexical level, the most significant being a failure to employ key legal terms and concepts.

This student does appear to have grasped the basic elements of the legal problem genre, however. His answer is constructed mostly of appropriate generic stages: F/O, L, F, L, A, F, O. That is, he starts with a forecast/overview (F/O) stage which maps out the relevant areas to be discussed (one area, of course, is not), followed nearly always by the nucleus of this genre in the standard order of presentation - the relevant law (L), followed by its case authority (A), and then the application of the law to the facts (F) - and lastly reaching final conclusions and stating opinion (O).

An analysis of the thematic structure of the text reveals very few themes that pertain to the legal concepts and principles relevant to this problem. The only exceptions are units 4, 5 (in the non-relevant part of the text), 9 and 13. Most of the themes in the student

---

1Howe(1990) reported that novice student writers in this genre are far more likely to give the details of a case in their answers than expert or professional writers who tend to advance the abstract legal concepts or principles with relevant authorities cited parenthetically. Thus, Howe concludes that novices: “need to build on generally recognizable facts, on stories. Once their techniques develop and knowledge of legal concepts increase, these are no longer necessary, and more and more of their papers concentrate on the abstract concepts of law. The greater the expertise, the more is assumed” (p. 230).
In these case between *M. University v. Corner Constructions Pty Ltd (CC)* we looking to the law of:

- Agreement of contract between both parties in offer and acceptance
- Damages and breach of contract - type of damage

on (?) aggravate damages.

---

So, if we looking to the specific of that contract

the CC will completed the building in 1992.

---

In these case, it is agreement of an offer and acceptance.

---

An offer → is a statement of a contract which a person is to be bound.

---

An acceptance → is a form of a contract.

---

Agreement from the offer.

---

Which means, University offer a contract to CC to build a building and CC accept that offer.

---

So, these already a contract of both parties which entitle for both parties not to breach the contract.

---

If, one of the parties breach the contract

it will bound to the parties who is breach the contract.

---

But, in fact CC breach the contract, which CC build the building...
was not completed until February 1993.

It is entitle University to sue CC because of breach of contract.

When M. University claims to CC.

It is a particular law in Damage.

* Damage → is a right for the injured party to have a compensation of his/her loase in the contract.

→ It is not entitle for injured party to get profit from the Compensation of damage.

e.g. case: about damage are:

1. Holiday in V__
   → about a holiday of one of the family was bad tours.
   the couple sue the agency for refund they money.

   because of their holiday is very bad.

2. About, the company which the machine mill was break down and need to sharp it quickly.
   the company ask to other company to fixed the mill as soon as possible in the next days.
   But the mill was fix about a week after that.

   The company sue to that person of the loss profit,

   because company was closed
but the court said: they can not have a profit from claim damage.

they only entitle to claim particular area of causes the damage, not from the loss of profit from company.

So, in these example case M. University can only claims to CC only the particular area which causes the damage.

So, in these example case M. University can only claims to CC only the particular area which causes the damage.

The University can not claim for their profitable in:
- $500,000 erecting temporary accommodation.
- $200,000 cost of inflation rate over 12 months
- $200,000 compensate the commerce students
- $50,000 for loss in staff morale
- $1000,000 (sic) punishment to builders.

All these claims are not liable to CC company because of the profit to the University.

as we can see the example case of the company want to fix their mill machine.

*The University will not success in these claims.
"A" text involve people, either the parties in the dispute (CC or M University) or the parties in the cases that are cited (the couple, the company, the mill etc). This is in marked contradistinction to the suggested answer supplied by the lecturer, which is essentially organised around the issues regarding the legal concepts and principles that are relevant to this case. In fact, the lecturer uses headings which have a thematic role as the point of departure for whole sections of text. Eleven themes in the "G" text involve claims for damages (different types etc.), 12 themes involve the relevant legal principles and rules and their application to the problem while only 4 themes concern the parties in the dispute. This difference in focus, on actions of people rather than on the legal concepts and principles that apply or can be generalised from people's actions, points to fundamental conceptual problems that this student has with the course and its content that are rooted in less than adequate English language proficiency, specifically a failure to comprehend and utilise abstract language and legal concepts.

Another area where this student lacks language competence is in the employment of modality, which as we have seen in the previous two chapters is a prominent feature of legal problem texts. In his 460 word answer (i.e. about half the length of the lecturer's suggested answer of 804 words), student "A" utilises a total of only three modalizations of probability and ten modulations of obligation and necessity, which are realised through six modal verbs (either will, or can) and seven other modal expressions such as metaphorical realisations like bound, entitle, and liable. By contrast, the "G" text (and the other lecturers' texts) employs a far greater number and variety of expressions of modality. The "G" text has 25 finite modal verbs that signify either modalizations of probability (22) or modulations of obligation and necessity (3) and include would, need to, will, may, must, and could. Similarly, there are a range of modal adverbs such as obviously, clearly and other expressions of modality in the "G" text although the modal verbs are far more significant in number in that text.

Although this student has picked up the basic structure or shape of the genre, he does not appear to have developed an understanding of an important component of legal reasoning: the use of modality, and especially the modalizations of probability that dominate these texts. This, then, further contributes to the lack of sophistication and appropriateness of his writing.

In terms of conjunction, the student "A" text would appear to be not so problematic. The text has been analysed into 32 CRUs with a total of 16 explicit links and 2 implicit ones which are roughly half internal and half external (10, and 7 and one "and"). Consequential and comparative categories of conjunction predominate with by far the most prevalent type of conjunction being consequence (see Table 6.1 below).
Table 6.1: Pattern & Distribution of Conjunction

<table>
<thead>
<tr>
<th>STUDENT</th>
<th>Total</th>
<th>consequential</th>
<th>comparative</th>
<th>additive</th>
<th>temporal</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;A&quot;</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>10 internal</td>
<td>61.1%</td>
<td>(n = 11)</td>
<td>27.9%</td>
<td>5.5%</td>
<td>5.5%</td>
</tr>
<tr>
<td>7 external</td>
<td>38.9%</td>
<td>(n = 7)</td>
<td>16.7%</td>
<td>(n = 1)</td>
<td>(n = 1)</td>
</tr>
<tr>
<td>1 &quot;and&quot;</td>
<td>11.1%</td>
<td>(n = 2)</td>
<td>11.1%</td>
<td>contr</td>
<td>conc</td>
</tr>
<tr>
<td>N = 18 (2 imp)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

This is in accord with the general patterns discovered for the "G" and other lecturers' texts (see Table 5.5, p.166). There is also some evidence of conjunction being employed in syllogistic patterns that have been revealed in the previous chapters. For example, units 9 through to 11 and units 19 to 21 employ conjunction in a deductive syllogistic manner. It seems apparent then that this student has a basic understanding of the generic form and of some aspects of legal reasoning, but his main problems would appear to be rooted in insufficient language competence of a general and specific nature which have affected both his understanding of course concepts and his ability to use and discuss them adequately. The student uses communication strategies (such as circumlocutions instead of the names of the leading cases, key legal terms and principles) which do not meet the requirements of this genre which demands, amongst other things, precision in the use of language, specialist terminology and classifications.

6.2 Student "E"

Student "E" wrote a very short 254 word answer (5 paragraphs) to this question which is reprinted in Appendix 7 (p. 265). The student's answer was divided into a total of 23 conjunctively related units, the rhemes and themes identified, the schematic structure mapped, and the network of conjunction charted as per the lecturers' texts in the previous chapters (see Figure 6.2 below).

Content

Regarding the content of the student "E" answer, there is mostly relevant content (but also some which is irrelevant and inaccurate) with three out of the four major points of law relevant to this problem mentioned (types of damages, causation, and remoteness). However, there is essentially insufficient definition or coherent development of these areas or issues, particularly in the first two very important areas of types of damages and the remoteness principle (see the suggested answer of lecturer "G" which devotes the bulk of the discussion to these areas, i.e. four headings, twelve paragraphs, and 31 CRUs to issues one and two while only two headings, six paragraphs, and 14 CRUs to the third and fourth issues of causation and mitigation). Furthermore, the third issue of
STUDENT E  
THEME (italicised)/ RHEME

CONJUNCTION  
INTERNAL  |  EXTERNAL

1  exp/add  |  exp/add
2  exp/cond  |  exp/cond

Schematic Structure

ADVICE TO M.

UNIVERSITY(Heading 2)

It would seem that M. does not want to repudiate the contract
and therefore this part is not pursued.

Claims for damages are assessed by two criteria Causation and Remoteness of Damage.

The causation would show that CC breached the contract
by not completing the building in the specified time.

The courts would regard this to be a condition of the contract
as in the case of Associated Newspapers v. Brancks

Therefore, M. can claim damages.

This was an express term of the contract.

Remoteness of damage show that only the $500,000 for erecting temporary accommodation on campus
and the extra $200,000 it cost to furnish the building due to the exorbitant inflation rate over the 12
month period as general damages.

The $100,000 as punishment cannot be claimed
| 12a | as Common Law only compensates | 12a | as |
| 12b | and Criminal Law only punishes. | 12b | and |
| 13 | The $200,000 to compensate Commerce Students and $50,000 for loss of staff morale would have to be | 13 | as |
| 13a | Nominal Damages | 13a | as |
| 14 | as Non-Pecuniary (Financial) Damages would be able to be assessed. | 14 | CASE SUPPORTING RE POLIMIS. |
| 15 | The foreseeability test would | 15 | CASE AUTH'Y |
| 16 | the fact of completing the building late would cause damage to M. | 16 | (A) |
| 17 | This therefore would required CC to foresee that there would be some damage, | 17 | therefore |
| 17a | although the extent of the damage may have been beyond the contemplation of CC. | 17a | although |
causation is merely cited by student “E” as relevant to the ascertainment of claims for damages but not defined and developed (i.e. there is not a full statement of the law, L, followed by the appropriate application of that law to the problem facts, F).

In fact, although the student correctly identifies in CRU 6 two of the relevant areas of law in this problem (i.e. causation and remoteness), the discussion that follows does not actually define or develop these concepts, but appears to confuse the cases and principles involving these concepts as they pertain to damages for negligence (i.e. in a separate body of law, torts) with the relevant cases and principles for damages for breach of contract in contract law. Paragraph three is really about the terms of a contract and not the issue of causation, about whether the stipulation as to the date of completion of the building constitutes an essential or major term of the contract, i.e. a condition, or whether it is a not so essential or a lesser term, i.e. a warranty. This discussion is not necessary in this problem (and not dealt with at all in the lecturer “G” text) and is a non-issue because the condition/warranty distinction makes no difference when it comes to the ability to sue for damages, which is actually what this problem is all about.

Paragraph four commences with the concept of remoteness but then proceeds to discuss types of damages (and is thus relevant to the answer) although the classifying categories the student used, namely general, “nominal” (nominal), and “non-pecuniary” (non-pecuniary) damages, are not defined and elaborated (i.e. there is no statement of the relevant law, L, but only the application of the law to the facts, F). Furthermore, nominal or (“token”) damages, which apply when the innocent party has suffered no compensable damage, are not relevant to this problem. The final paragraph returns again to the remoteness principle although it is not explicitly named, defined, or linked to the previous mentions of this concept at the beginning of the third and fourth paragraphs (CRUs 6 & 11). In addition, “E” fails to delineate the two limbs of the rule in Hadley v Baxendale (see “G” text) and by citing the foreseeability test (CRU 15) and the Polemis case (CRU 14) he appears to conflate the test of remoteness of damage in breach of contract cases with that of remoteness of damage in cases involving the tort of negligence.

While student “E” correctly cites one major relevant case authority (Hadley v Baxendale), he also cites two other authorities (Associated Newspapers v Brancks1 and Re Polimis2), neither of which are really relevant to this case. The former is authority

---

1 The correct citation is Associated Newspapers Ltd v Brancks.
2 The student has also misspelt this case name. The Polemis case (re An Arbitration between Polimis and another and Furness, Withy and Company Ltd) established liability for damages for all direct consequences of a negligent act, even though they may not be reasonably foreseeable. This is much broader than the corresponding law involving remoteness of damages in contract law in
for the condition/warranty distinction discussed above, which is not at issue in this problem. The Re Polemis case involves the concept of remoteness but is authority in the law of torts (i.e. damages for negligence) and not the law of contract, which is the relevant head of law in this particular problem question. Furthermore, this case appears to be used as authority for claims for non-pecuniary damages (CRUs 13-14) and this is incorrect. Jarvis v Swans Tours (see “G” text) is an appropriate authority for these types of claims in contract law.

Therefore, while the student has identified three of the main areas germane to this problem question, he has not discussed them fully and adequately in the context of this question, also including some irrelevant and inaccurate material. Consequently, the steps in the legal reasoning process are incomplete and generally poorly structured. For example, only two clear statements of Opinion (O) have been reached (CRUs 9 & 12) in answer to the five claims of the problem question. The first is in answer to the “issue” expressed by CRU 1 regarding whether there is liability because of breach of contract. This is, in fact, a non-issue because the problem question clearly states that the contract specified a completion date, so there is obviously a breach of the terms of the contract and thus liability for damages on the part of the offending party for their breach. Thus, the opinion reached in CRU 9 and its related discussion in the third paragraph are not really necessary (see the lecturer “G” text which omits any discussion of these areas). The second statement of opinion (O), which is followed by appropriate reasons (CRUs 12a & 12b), is both relevant and correct however, but the student has offered and achieved only one correct conclusion out of five.

Language

The student’s structuring of his answer suggests an incomplete understanding of the genre. While the student starts appropriately with the first paragraph devoted to stating the issues (I) to be discussed and resolved, the necessary stage of enunciating the relevant law in some detail (L) is almost completely absent (CRU 6 is the only exception). The student’s answer to the question almost entirely consists of the penultimate generic stage of application of the law to the facts (F) with, as mentioned above, three case authorities (A) cited (in CRUs 8, 14, & 16) and only one relevant opinion (O) stage (CRU 12). The schematic structure of this student’s answer is as follows: I, L, F, A, O, F, O, F, A, F, A, F.

which the second limb of the Hadley v Baxendale case establish liability for damages that are not reasonably foreseeable only if these special circumstances were in the contemplation of both parties at the time of making the contract.

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Not surprisingly, because of the underdevelopment of the relevant law (L) stage in this answer, there is also a complete lack of the syllogistic reasoning patterns that frequently occur across the law (L), application to the facts (F), and opinion (O) stages involving both lexical repetition and parallelism as well as external and internal conjunction as discussed in the previous two chapters in the analysis of the lecturers' texts. So, on the basis of this measure, the student has not demonstrated an acceptable facility with legal reasoning, which, of course, is fundamental to this type of writing.

An analysis of the thematic development of the "E" text reveals a fundamentally different textual development to that of the "A" text. The "E" text is appropriately focussed on the legal principles and concepts relevant to awarding of damages for breach of contract as the point of departure for a large number of its conjunctively related units (CRUs 2, 3, 5, 6, 7, 11, 15, 17), as well as on case authorities for these principles and concepts (CRUs 14, 16), and the damages claimed in this particular problem (CRUs 12, 13). Whereas the "A" text was largely developed around the parties in the dispute or the parties in the cases cited, only two units (CRUs 1, 9) in the "E" text involve the parties in the dispute. Thus, the "E" text is far more appropriately structured in this regard.

Student "E" uses 12 explicit conjunctions (and one implicit one) in his 23 CRUs, including 4 external, 6 internal, and 3 "and"s (see Table 6.2, below). As expected, the dominant category of conjunction in this text is the consequential category with nine out of the thirteen conjunctions being in this category and six of these being consequence conjunctions. This result is in accord with the patterns found in the lecturers' texts (see Table 5.5, p. 166).

Table 6.2: Pattern & Distribution of Conjunction

<table>
<thead>
<tr>
<th>STUDENT</th>
<th>Total</th>
<th>consequential</th>
<th>comparative</th>
<th>additive</th>
<th>temporal</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;E&quot;</td>
<td>254 words (CRUs 23)</td>
<td>6 internal</td>
<td>69.2% (n = 9)</td>
<td>-</td>
<td>30.8% (n = 4)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>4 external</td>
<td>46.2% (n = 6)</td>
<td>-</td>
<td>23.1% &quot;and&quot; (n = 3)</td>
</tr>
<tr>
<td>N = 12 (1 imp)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

However, there is a complete absence of any conjunctions from the comparative category which was consistently the second most important type of conjunction in the lecturers’ texts. Furthermore, there are no temporal conjunctions and apart from the 3 "and"s, only one other additive conjunction. These last two categories of conjunction usually play a relatively minor role in these texts unless the timing and sequence of the events in the problem are significant requirements to be taken into consideration (as in the lecturer "N" text). The complete absence of any similarity or contrast conjunctions undoubtedly is related to the failure of the student to structure his answer in a generically
appropriate manner. As there is almost no discussion of the relevant law prior to applying the law to the problem facts, there is little opportunity for drawing comparisons between previously decided cases and their legal principles and the facts in this particular case.

Unlike the author of the previously discussed text ("A"), student "E" demonstrates an appropriate facility with and understanding of modality in his answer to this problem question. This student's use of modality has been analysed in Table 6.3 below.

Table 6.3: Modality (Text "E")

<table>
<thead>
<tr>
<th>Finite Modal Operators (implicit, subjective)</th>
<th>Modality</th>
<th>CRU</th>
</tr>
</thead>
<tbody>
<tr>
<td>should be paid</td>
<td>Mo(m)</td>
<td>2a</td>
</tr>
<tr>
<td>should be paid</td>
<td>Mo(m)</td>
<td>2a</td>
</tr>
<tr>
<td>would seem</td>
<td>Mo(m)</td>
<td>4</td>
</tr>
<tr>
<td>must be paid</td>
<td>Mu(h)</td>
<td>3</td>
</tr>
<tr>
<td>would regard</td>
<td>Mo(m)</td>
<td>8</td>
</tr>
<tr>
<td>would regard</td>
<td>Mo(m)</td>
<td>8</td>
</tr>
<tr>
<td>cannot be claimed</td>
<td>Mu(h)</td>
<td>12</td>
</tr>
<tr>
<td>would have to be</td>
<td>Mu(h)</td>
<td>12</td>
</tr>
<tr>
<td>would be able to be</td>
<td>Mo(m)</td>
<td>13a</td>
</tr>
<tr>
<td>would be case (sic)</td>
<td>Mo(m)</td>
<td>15</td>
</tr>
<tr>
<td>may have been</td>
<td>Mo(l)</td>
<td>17a</td>
</tr>
<tr>
<td>would required</td>
<td>Mo(m)</td>
<td>17</td>
</tr>
<tr>
<td>cannot be claimed</td>
<td>Mu(h)</td>
<td>12</td>
</tr>
<tr>
<td>would have to be</td>
<td>Mu(h)</td>
<td>12</td>
</tr>
<tr>
<td>would be case (sic)</td>
<td>Mo(m)</td>
<td>15</td>
</tr>
<tr>
<td>may have been</td>
<td>Mo(l)</td>
<td>17a</td>
</tr>
<tr>
<td>would required</td>
<td>Mo(m)</td>
<td>17</td>
</tr>
</tbody>
</table>

(b) Other Modal Expressions (including Metaphorical realisations)

<table>
<thead>
<tr>
<th>Other Modals</th>
<th>Modality</th>
<th>CRU</th>
</tr>
</thead>
<tbody>
<tr>
<td>liable</td>
<td>Mu(h)</td>
<td>1, 2</td>
</tr>
<tr>
<td>able to</td>
<td>Mu(*)</td>
<td>13a</td>
</tr>
<tr>
<td>required</td>
<td>Mu(h)</td>
<td>17</td>
</tr>
</tbody>
</table>

(a) implicit/subjective realisations (i.e. modal verbs)

<table>
<thead>
<tr>
<th>Modality</th>
<th>CRU</th>
</tr>
</thead>
<tbody>
<tr>
<td>low</td>
<td>1</td>
</tr>
<tr>
<td>median</td>
<td>2</td>
</tr>
<tr>
<td>high</td>
<td>3</td>
</tr>
</tbody>
</table>

(b) other modal expressions

<table>
<thead>
<tr>
<th>Modality</th>
<th>CRU</th>
</tr>
</thead>
<tbody>
<tr>
<td>low</td>
<td>1</td>
</tr>
<tr>
<td>median</td>
<td>2</td>
</tr>
<tr>
<td>high</td>
<td>3</td>
</tr>
</tbody>
</table>

**Modulations of potentiality, i.e. Mu(*) not included.

This brief text has a great deal of modality (in 14 out of 23 CRUs), with by far the majority of instances expressed through finite modal verbs (a total of 14). This is in accord with the analyses of the lecturers' texts where modal verbs predominated with most of the modality occurring in the application of the law to the problem facts (F) and the opinion (O) stages of the texts, as is also the case with the "E" text. Furthermore,
modalizations of probability also predominate and are overwhelmingly realised as median in value while modulations of obligation and necessity are all expressed as outer values (mostly high), in line with the patterns found in the lecturers’ texts.

It is therefore clear that although this student has not followed the expected generic structure and thus not fully and appropriately developed his answer (especially with regard to “legal reasoning”), he appears to have a firm understanding of other features of the genre including thematic progression and modality. What is not clear, however, is the extent to which this student would have been able to accurately, intelligibly and fully define the relevant law if he had a finer appreciation of the requirements of the genre and structured his answer more appropriately. His failure to offer clear statements of opinion (O) on the questions asked and the brevity of the answer would suggest that this student’s thinking is somewhat confused although he does appear to have quite a deal of relevant content knowledge. It is, therefore, this author’s contention that he would have achieved a far more successful mark had he been more practised at reasoning through problems such as this one by more thoroughly following the archetypical stages of this genre.

6.3 Student “K”

Student “K” wrote a 430 word answer (7 paragraphs) to this question which is reprinted in Appendix 8 (p. 266). The student’s answer was divided into a total of 21 conjunctively related units, the rhemes and themes identified, the schematic structure mapped, and the network of conjunction charted as per the lecturers’ texts in the previous chapters (see Figure 6.3 below).

Content

Regarding content, as with the “E” text, the student “K” answer mostly contains relevant content although there are also some sections (e.g. CRUs 1 to 5) that do not. Three out of the four areas of law identified by the lecturer as relevant to this problem have been mentioned (types of damages, remoteness and causation) in this answer although the important concept of remoteness is only mentioned once (CRU 16) and is not defined or elaborated. Thus, only two out of the four areas are treated in any depth. Moreover, the first section of the text (CRUs 1 to 5) is again not really relevant because the contract has clearly been breached and this is not an issue. In addition, the discussion of non-pecuniary damages in the fifth paragraph (CRUs 11 to 15) is only partially correct because there are a number of units (CRUs 12-14a) containing quite irrelevant discussion regarding consideration, which is also not at issue in this case.
Obviously, on the University's part, they claimed that there is a breach of contract by CC in accordance with the condition of the contract specifying that the building should be completed for occupation in February 1992.

If the establishment is true and enforceable,

M. University would be entitled to receive damages for the breach of contract as well as the expenses that was incurred due to the breach of contract.

However, according to CC, they would argue that the statement they made clearly indicate that the completion of the contract "should" be ready by February 1992 but they did not specified that it "will" be completed.

This would allow the defendant to provide necessary allowance for completion due to circumstances.

Based on my knowledge, I think that M. University should be able to claim compensation on the $500,000 for the election of temporary accommodation and the $200,000 for the additional expenses incurred due to inflation only.

The very fact that the delay in completion of the building caused M. University to incur extra cost in providing temporary accommodation raised the judgement against CC.

This could be weigh using the "but for" test which indicate the position of the plaintiff if the defendant has not committed the breach.

Similarly, the University should be able to claim compensation on the extra cost incurred due to exorbitant inflation rate.

The judgement would be that though CC has no knowledge or could not foresee the increasing inflation rate in the next coming year, however, this expenses could have been avoided if the building is completed on time.

The third claim for the $200,000 is for the non-pecuniary damages that the defendant has caused due to the breach of contract which is intangible.
<p>| | | | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>12</td>
<td>However, the University could not claim damages for something which has not happened yet</td>
<td></td>
<td>exp/conc 12</td>
<td>however</td>
</tr>
<tr>
<td>13</td>
<td>and no consideration is given</td>
<td>exp/add 13</td>
<td>and</td>
<td></td>
</tr>
<tr>
<td>13a</td>
<td>in order to establish the stand.</td>
<td>exp/purp 13a</td>
<td>in order to</td>
<td></td>
</tr>
<tr>
<td>14</td>
<td>This means that the claim is too vague for damages</td>
<td>exp/consq 14</td>
<td>as</td>
<td></td>
</tr>
<tr>
<td>14a</td>
<td>as it does not proved that the plaintiff had gone into some consideration to establish the damages.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>15</td>
<td>This is best demonstrated in the case of Swan Tour Pte Ltd where the actual event has occurred and the plaintiff actually suffered for that event.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>16</td>
<td>As regard to the fourth claim on loss in staff morale the damages is considered too remote and invalid in the contract.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>17</td>
<td>Last but not least, the last claim could not be established too</td>
<td>exp/succ 17</td>
<td>last but not least</td>
<td></td>
</tr>
<tr>
<td>17a</td>
<td>as the breach of the contract could only allowed the plaintiff to claim compensation under the rules of damages but not to punish.</td>
<td>exp/consq 17a</td>
<td>as</td>
<td></td>
</tr>
</tbody>
</table>
Only one relevant case authority is cited by this student (Jarvis v Swans Tours) although not fully and completely accurately: the legal convention is that cases are always underlined (cf. Latin names of plant and animal species in biology). In addition, the point of this case is that it establishes that damages are recoverable for non-pecuniary loss where the subject of the contract concerns entertainment, enjoyment, etc. The student fails to elaborate this point and apply these concepts to the problem.

Student “K”, in contrast to “E”, reaches four correct conclusions or statements of opinion (O) out of the five different damage claims of the problem question. Overall, the content in this student answer is broadly accurate, though with a couple of irrelevancies, but suffers mostly because of its incompleteness, especially in regard to the major area of remoteness, and its concomitant lack of fully developed reasoning and generic structuring (discussed below).

Language

The student’s answer is lacking in two major generic stages. The first deficiency is the failure to state any issues (I) or alternatively use a forecast/overview (F/O) stage to guide the subsequent discussion. Ignoring the irrelevant first two paragraphs, the answer really begins with what is usually a final stage, the statement of opinion (O) regarding the first two claims for damages of the problem question. Thus, the student has jumped to the end of the process first and has structured his answer around a focus on the “answers” to the questions asked rather than on legal reasoning and argument through which conclusions are finally reached. This approach is, in this author’s experience, not uncommon in novices to this genre, who are often fixated on getting the “right” answer rather than on the necessary steps of logic and reasoning along the way.

The second deficiency is the same as for the previous student (“E”), i.e. an almost complete failure to state, define and elaborate the relevant law (L) as a separate stage preparatory to applying that law and legal principles to the facts of the case at hand (F). In the student “K” text, there is only one unit (CRU 8) which can be classed as a statement of the relevant law (L). Consequently, the student’s text is basically composed of only two stages: the final statement of opinion (O) and the application of the law to the problem facts (F), with the conclusions themselves generally preceding the reasoning and justification for them throughout the answer. The stages of the student’s answer are as follows: F, O, F, L, F, A, F.

In common with the preceding text (“E”), there is also a general lack of syllogistic reasoning patterns in the student “K” text. This is no doubt due to the omission of the separate stage of advancing the relevant law and then applying it to the problem facts in a
deductive fashion. The student does, however, display recognition of the dialectic of the law in that he looks at two possible contrasting positions or arguable interpretations of the wording of the contract based on the modal verb *should* in the problem question (see discussion of modality below).

An examination of the thematic progression of the text reveals that five themes relate to the parties in the dispute (CRUs 1, 3, 4, 9, 12), five to legal principles and their application (CRUs 2, 8, 13, 14, 15), five to the problem question: the claims for damages (CRUs 11, 16, 17) and the facts of the problem (CRUs 5, 7), and two to judgments and opinions (CRUs 6, 10). The "K" text is, in this regard, midway between the preceding two texts ("E" and "A"). The "E" text was primarily developed around legal principles and their application rather than just on the parties in the dispute as was found with the "A" text. The "K" answer, on the other hand, is somewhat more mixed with equal numbers of units of the text developed around the parties in the dispute as well as the legal principles applicable. The primary orientation of this writer towards the giving of opinion and the application of the problem facts (as revealed by the schematic structure discussed above) is also reflected by the thematic development where four units have opinions or facts as their points of departure.

Thus, while the "E" text more closely resembles the lecturer's model text in terms of the emphasis placed on the relevant legal principles and their application as themes, the "K" text is somewhat underdeveloped in this regard. This is also reflected by the failure of student "K" to explicitly name (i.e. nominalise) and define the relevant legal principles and concepts (i.e. *types of damages, remoteness, causation, and mitigation*) in this case. For example, in CRUs 7 and 8, the principle of *causation* is not named but it is discussed. Likewise, in CRU 16, the principle of *remoteness* is not named as such or defined. This is in contradistinction to the method of textual development that predominates in both the lecturer's text ("G") and the "E" student text where these key terms and concepts act as principal points of departure to the development of the discussion.

The student's use of conjunction in the "K" text is generally in keeping with the patterns found in the model texts analysed in the previous two chapters (see *Table 5.5*, p. 166; and *Table 6.4* below). In the "K" text, there are ten explicit and one implicit conjunctive links across a total of 21 CRUs. Of these eleven conjunctive links, there are equal numbers of external and internal conjunctions (5 each) and one "and". The types of links are in accord with the expected patterns in that the vast majority of links fall in the *consequential* and *comparative* categories (6 and 3 respectively) with *temporal* and *additive* categories being far less important (one *temporal* and one "and"). Predictably,
half of the consequential links are consequence conjunctions (3) while in the comparative category, contrast conjunctions (2) slightly outnumber similarity ones.

**Table 6.4: Pattern & Distribution of Conjunction**

<table>
<thead>
<tr>
<th>STUDENT</th>
<th>Total</th>
<th>consequential</th>
<th>comparative</th>
<th>additive</th>
<th>temporal</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;K&quot;</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>430 words</td>
<td>5 internal</td>
<td>54.5% (n = 6)</td>
<td>27.3% (n = 3)</td>
<td>9.1% (n = 1)</td>
<td>9.1% (n = 1)</td>
</tr>
<tr>
<td>(CRUs 21)</td>
<td>5 external</td>
<td>27.3% contr</td>
<td>18.2% contr</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1 &quot;and&quot;</td>
<td>N = 11 (1 imp)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

It is noteworthy that the "K" text (430 words), although considerably longer than the "E" text (254 words), is organised into roughly equal numbers of conjunctively related units (21 and 23 respectively) and displays similar numbers of conjunctions also (11 and 13 respectively). The differences appear to lie in the prominent use of embeddings and projected clauses (which are not treated as separate units in this analysis) and the greater part that referential links would appear to be playing in the "K" text. For example, there are projected and/or embedded clauses with finite verbs in no fewer than 13 out of the 21 CRUs in this text (CRUs 1, 2a, 3, 4, 6, 7, 8, 10, 11, 12, 14, 14a, 15) as opposed to only three projected and/or embedded clauses out of the 23 CRUs of the "E" text. Similarly, the "K" text employs the demonstrative referent *this* in theme position in four out of 21 CRUs (CRUs 5, 8, 14, 15) compared to just two uses out of 23 CRUs (CRUs 10, 17) in the "E" text. Both the use of embeddings and the important part played by referents such as *this* were features that were noteworthy in the analyses of the lecturers' texts (especially the "S" text) in the previous chapters. The "K" text is clearly a lexically more dense text than the other two with its preponderance of embeddings and projections and thus is in keeping with much writing in legal contexts in terms of lexical density, and use of embeddings.

The "K" text displays quite prominent use of modality throughout. As the lecturers' texts illustrated, modality is mostly employed in the application of the law to the facts (F) and the opinion (O) stages of this genre. Since almost the whole of the "K" text consists of these two stages, it is not surprising that there is a very significant use of modality in this text. There were 15 modal finite verbs and 9 other modal expressions including modal adverbs such as *obviously* and *clearly* and other metaphorical realisations of modality such as *enforceable* and *I think*. **Table 6.5** (below) illustrates the distribution of modality in the "K" text.

As with the lecturers' texts, the predominant means of expressing modality is by the use of modal finite verbs, with all but one being either *should*, *could*, or *would*. Also, there was some ambiguity in the meanings of a number of modal verbs (e.g. *could not be*
### Table 6.5: Modality (Text “K”)

Mo = modalization of probability  
Mu = modulation of obligation  
Mu(*) = modulations of potentiality  
b = high value  
m = median value  
l = low value

**(a) Finite Modal Operators (implicit, subjective)**

<table>
<thead>
<tr>
<th>Finite Modals</th>
<th>Modality</th>
<th>CRU</th>
<th>Finite Modals</th>
<th>Modality</th>
</tr>
</thead>
<tbody>
<tr>
<td>should be completed</td>
<td>Mu(m)</td>
<td>1</td>
<td>would be entitled</td>
<td>Mo(m)</td>
</tr>
<tr>
<td>would argue</td>
<td>Mo(m)</td>
<td>3</td>
<td>“should” be</td>
<td>Mo(m)</td>
</tr>
<tr>
<td>“will” be completed</td>
<td>Mo(h)</td>
<td>4</td>
<td>would allow</td>
<td>Mo(m)</td>
</tr>
<tr>
<td>should be able to claim</td>
<td>Mo(m)</td>
<td>6</td>
<td>could be weigh (sic)</td>
<td>Mu(*)</td>
</tr>
<tr>
<td>should be able to claim</td>
<td>Mo(m)</td>
<td>9</td>
<td>would be</td>
<td>Mo(m)</td>
</tr>
<tr>
<td>could not foresee</td>
<td>Mu(*)</td>
<td>10</td>
<td>could `ve been avoided</td>
<td>Mo(l)</td>
</tr>
<tr>
<td>could not claim</td>
<td>Mu(h)</td>
<td>12</td>
<td>could not be established</td>
<td>Mo(m)/Mu(*)</td>
</tr>
<tr>
<td>could allowed (sic)</td>
<td>Mu(*)</td>
<td>17a</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**(b) Other Modal Expressions (including Metaphorical realisations)**

<table>
<thead>
<tr>
<th>Other Modals</th>
<th>Modality</th>
<th>CRU</th>
<th>Other Modals</th>
<th>Modality</th>
</tr>
</thead>
<tbody>
<tr>
<td>obviously</td>
<td>Mo(h)</td>
<td>1</td>
<td>enforceable</td>
<td>Mu(h)/Mu(*)</td>
</tr>
<tr>
<td>entitled to</td>
<td>Mu(l)</td>
<td>2a</td>
<td>clearly</td>
<td>Mo(h)</td>
</tr>
<tr>
<td>allow</td>
<td>Mu(l)</td>
<td>5, 17a</td>
<td>I think</td>
<td>Mo(m)</td>
</tr>
<tr>
<td>able to</td>
<td>Mu(*)</td>
<td>6, 9</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**(a) implicit/subjective realisations (i.e. modal verbs)**

<table>
<thead>
<tr>
<th>(Mu)**</th>
<th>Modulation (Mo)**</th>
</tr>
</thead>
<tbody>
<tr>
<td>low</td>
<td>median</td>
</tr>
<tr>
<td>1</td>
<td>1</td>
</tr>
</tbody>
</table>

**(b) other modal expressions**

<table>
<thead>
<tr>
<th>(Mu)**</th>
<th>Modulation (Mo)**</th>
</tr>
</thead>
<tbody>
<tr>
<td>low</td>
<td>median</td>
</tr>
<tr>
<td>3</td>
<td>1</td>
</tr>
</tbody>
</table>

**modulations of potentiality, i.e. Mu(*) not included**

Established in CRU 17 can be glossed either as “certainly is not established”, i.e. modalization of probability, or as “is not able to be established”, i.e. modulation of potentiality). Student “K” consciously makes use of this inherent ambiguity of modal verbs in the first section of his answer where he addresses the non-issue of whether a breach of the terms of the contract has in fact occurred. The writer is drawing attention to the ambiguity as expressed in the problem question where it is stated that: The contract specified that it [the building] should be completed and ready for occupation by February 1992, and how this could be interpreted and argued by both parties in the dispute (CRUs 1-5). He argues that “should” in the question (but is this the actual wording in the contract?) can be glossed either as “supposed to”, i.e. Mu(m) - which would be M. University’s interpretation (CRU 1), or as “probably would”, i.e. Mo(m) - which would be CC’s interpretation (CRU 3) as opposed to “will” (CRU 4) meaning...
"certainly would", i.e. Mo(h). This is no doubt an unforeseen interpretation for lecturer “G” who set this question and clearly states in his suggested answer (CRUs 1-2) that the contract had “obviously” been breached and this was not at issue.

Modalizations of probability clearly predominate over modulations of obligation and necessity (13 as opposed to 6), a result in keeping with the lecturers’ texts. There are also seven modulations of potentiality in this text which seems to be a somewhat higher proportion of this type of modality than evident in the lecturers’ texts. At least three of these (CRUs 8, 17, 17a) are rather curious non-standard linguistic choices: can would be more appropriate in CRU 8 as a statement of the relevant law, would not succeed or would not be successful would be more appropriate in CRU 17, and only allows instead of could only allowed would be far more appropriate in CRU 17a. Another curious result is that while outer values predominate in the realisations of modulations of obligation and necessity (i.e. what is allowed and what is required) as expected from the lecturers’ texts, median value modalizations of probability (what is probably true) only slightly predominate over outer values in the student “K” text. The lecturers’ texts (and Maley’s analyses of legal judgments) clearly favour median value modalizations suggesting that judgments and legal decisions are more equivocal and less certain than are statements of obligation and necessity in law. So, while this student seems to have generally utilised modality in an appropriate fashion for this genre and appears aware of the meaning potential of modals especially with regard to ambiguity, there are some inappropriacies as well. For example, it would have been far more appropriate to have used the median value modalization would be rather than the totally unequivocal is in CRU 16. Moreover, the use of the high value obviously in theme position as an opening gambit for the entire text (CRU 1) creates the feeling of a bolder assertion of opinion than the use of the same modal adverb by the lecturer (“G”) in his opening sentence (CRU 1) in a non-marked position.

Overall, student “K” appears to have achieved a better result than student “E” on the basis of having reached four correct conclusions to the questions asked with similar degrees of relevant and irrelevant or inaccurate content. They both identify but fail to adequately develop three out of the four major areas of the problem question as outlined by lecturer “G”, both cite only one relevant case authority, both have some irrelevancies and inaccuracies, and both have incomplete generic structuring and development of legal reasoning. While the “K” student seems more assured in his analysis and to mostly possess appropriate sophistication at the lexi-co-grammatical and discourse level as indicated by his use of clausal embeddings, reference, conjunction and modality (though there are also some problems here), he suffers from not explicitly naming and elaborating two of the key concepts in this question (causation and remoteness) and thus

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not developing the relevant law before trying to apply it to the facts of the problem. This student, it is contended, would have achieved a far more successful result if he had been more aware of (and had more explicit guidance and practice in) the archetypal generic structuring of answers to legal problem questions.

6.4 Student “J”

Student “J” wrote a 578 word answer (14 paragraphs) to this question which is reprinted in Appendix 9 (p. 267). The student’s answer was divided into a total of 40 conjunctively related units, the rhemes and themes identified, the schematic structure mapped, and the network of conjunction charted as per the lecturers’ texts in the previous chapters (see Figure 6.4 below).

Content

Regarding content, student “J” correctly identifies the area of law as breach of contract (CRU 1) and very systematically sets out to elaborate the general law regarding breach of the terms of a contract and remedies for breach in the early part of her answer (CRUs 2-8b) before developing the relevant law regarding damages as a remedy for breach of contract (the actual focus of this problem question) in CRUs 9-12. Her answer is almost entirely accurate using and defining appropriate legal terms and concepts, as well as providing relevant authority for those propositions (CRUs 3a, 11, 12).

Student “J” correctly cites the three leading case authorities that appear in the lecturer “G” suggested answer (i.e. Jarvis v Swans Tours, the Victoria Laundry case, and Hadley v Baxendale) as well as a not so relevant case in CRU 3a which is authority for representations becoming part of a contract and therefore actionable under contract law for breach of contract. In fact, the student’s second, third and fourth paragraphs where she maps out the general concepts pertaining to terms of a contract and the remedies associated with their breach, although accurately and concisely expressed deals with material that is not really at issue in this problem and thus the detailed discussion is not really necessary (as the lecturer “G” answer attests). On the other hand, general discussion of terms of a contract and their breach in this answer, although unnecessary, does proceed naturally in paragraphs 5, 6, and 7 to the specific focus of this particular question which is on the remedy of damages for breach of contract.

The case authorities cited at CRUs 11, and 12 are correctly linked to an adequate elaboration of the relevant legal principles they have established or confirmed. Moreover, the application of these principles in the second half of the answer (CRUs 13-
This problem involves the area of Law of Contract and in particularly breach of contract.

The problem concerns a written contract, the terms of which must be determined to be either express or implied.

Any terms included in a written contract are expressed whereas implied terms can be due to previous dealing, trade practice requirements or collateral statements (in partly written, partly oral contract) (for example, in Dick Bentley Productions v. Harold Smith Motors).

Once a term has been established it is then classified as either a condition, a warranty or an innominate term.

Conditions are very important terms to a contract, the breach of which allows an innocent party to repudiate the contract and/or sue for damages.

Warranties are terms of lesser importance, breach of which allows an innocent party to sue for damages only.

Innominate terms fall somewhere between conditions and warranties, the remedy for which is determined by the effect of the breach.

If an innocent party chooses to repudiate a contract, it is terminated from that point and releases the parties from any further obligations.

Damages in law of contract are not to punish but to compensate, to place the innocent party in the position which they would have been in had the contract not been breached.
Punitive damage are therefore not relevant to Law of Contract.

Also, damages for non-pecuniary loss are restricted to contracts involving enjoyment or entertainment, for example Jarvis v. Swans Tours.

Pecuniary damages are only awarded for losses caused which are seen to be naturally occurring, occurring from the usual course of doing business (Victoria Laundry case) or losses caused by an event which is, or is reasonable to be, in the contemplation of both parties at the time of entering into the contract (Hadley v. Baxendale).

In the present case, the problem does involve a written contract (assumed) and the fact that it is specified that the building should be completed by February 1992, makes that statement an expressed term of the contract.

The requirement as to the time of completion of the work is not a condition of the contract, since breach of which would not render the contract totally different from that which was intended, but is only a warranty.

That is, the contract can still be fulfilled regardless of the breach.

As such, the University is only able to sue for damages for breach of the term and only for economic loss occurring naturally, from the usual course of doing business, or that which would have been in the contemplation of both parties at the time of entering the contract.

Therefore, I consider the $500,000 claim for erecting temporary classrooms as being viable.

Since the University specified that the building was required to be finished by February 1992, it is obvious that they intended to use it, and alternative accommodation would be required otherwise.

The $200,000 extra to furnish the building due to inflation, would not succeed since it is too remote, would not have been in the contemplation of both parties initially.
Therefore, a claim for such would not succeed.

Claims for $200,000 compensation for students and $50,000 compensation for staff would also fail.

Such claims are based on non-pecuniary loss and as such are not applicable to the Law of Contract as concerns this case.

Also, $100,000 as punishment to builders concerns punitive damages which are not covered by contract law, and would therefore fail.
24a) to the facts of the problem is achieved satisfactorily by this student leading to correct conclusions regarding the five questions asked. The student therefore demonstrates a well-developed capacity for legal reasoning.

However, although this student achieved the highest mark for this question through a carefully crafted answer, she has not addressed two of the issues identified in the lecturer “G” text as pertinent to this problem, namely causation and mitigation. The two issues treated thoroughly and accurately by her are clearly the most important of the four issues (these two issues are significantly the first two discussed¹ and also comprise 12 paragraphs and 481 words of the lecturer’s answer as opposed to causation and mitigation which, as third and fourth issues, comprise only 6 paragraphs and 207 words). The relative unimportance of the third issue is also demonstrated by the fact that the course text (Latimer, 1990), while devoting three detailed sections (6-420, 6-430, and 6-440) and nearly six pages to the principle of remoteness and its relevant cases and two sections on types of damages (6-450 and 6-460) covering two and a half pages, contains no separate treatment of causation in the section on remedies for breach of contract. This issue does, however, receive detailed attention in the related area of damages for negligence in the law of torts, which is of course not relevant to this particular problem. It would therefore seem unduly harsh in this author’s opinion to penalise students who do not discuss this issue in depth. The issue of mitigation, on the other hand, does receive some detailed discussion in the course text in the section on remedies for breach of contract in one section (6-480) comprising about one page. Since the burden of proof regarding mitigation of loss lies on the defendant (as a defence against claims for damages), it is clearly of far less importance in the establishment of claims for damages by a plaintiff.

Language

The lexico-grammatical, discourse and genre level features of the student “J” text closely resemble those described in the previous two chapters as applying to the legal problem question answer genre. Analysis of the schematic structure of the “J” text reveals that archetypical generic structuring has been utilised. All stages - except Issues (I), because the Forecast/Overview stage (F/O) is utilised instead - have been employed and mostly in the expected order with the Law (L) and its Authority (A) being recursive as well as the Application of the law to the Facts (F) and the Opinion (O) stages recurring several

¹Many law lecturers teach their students to list and deal with the issues raised by a problem in order of their importance when answering legal problem questions (Davis, 1994, personal communication).
times to cover the five parts of the problem question. The schematic structure of the student's answer is as follows: F/O, L, A, L, A, F, O, F, O, O, F, F, O.

The thematic development of the "J" student text was very similar to that of the lecturer "G" text and in contrast with the three previously analysed student texts. In the "J" text, nearly all of the themes were either related to the relevant legal terms or principles in this case (CRUs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12) or to the details of the problem question itself, i.e. the problem facts and the damages claims (CRUs 1, 2, 13, 14, 15, 16, 19, 20, 21, 22, 23, 24). The parties in the dispute, on the other hand, were not used thematically and only one theme related to the expression of judgment or opinion. The thematic development of the "J" text closely matched the schematic structure in that all the themes which focused on legal principles and terms occurred in the statement of the relevant law (L) stages of the text while the themes which related to the problem facts and claims for damages all occurred in either the application of the law to the facts (F) or the opinion (O) stages. In terms of the pattern and types of thematic links in the "J" text, rheme to theme links predominated in the law (L) sections of the text (with "radiating" links from CRU 4a to CRUs 5, 6, & 7), while theme to theme links predominated in the rest of the text. The marked theme In the present case in CRU 13 signals the end of the discussion of the relevant law (L) and the beginning of the application of the law to the facts (F) and it is significant that none of the other three students used any marked themes in this way to signal the stages in the text. This feature was a notable one, however, in the lecturer's texts, especially lecturer "S".

Another textual feature that was noted in the analyses of the lecturers' texts was the significant use of the passive voice. The "J" student text likewise displays a healthy incidence of passive verbal groups. In her text which comprised a total of 40 CRUs, there were a total of 17 passive groups employed (in CRUs 2, 4, 4a, 7, 8a, 9b, 11, 12, 14, 15a, 16, 19, 19a, 23, 24), roughly half in the law (L) section and half in the application to the facts (F). This is clearly because this type of discourse focuses on the legal principles that have been decided in previous cases (and not on who decided them) as well as the events of the problem and their legal implications (and not so much on the agents causing those events, as reflected by the almost total lack of any themes in this text relating to the parties involved).

A very important feature of the answers to legal problem questions is the ability to use appropriate patterns and methods of legal reasoning. One important method is, as we have seen, the use of deductive syllogisms and they are also in evidence in the student "J" text. Three of the opinions given by the student are developed across the law (L), application to the facts (F), and opinion (O) stages of the answer in a syllogistic fashion.
involving parallelism and lexical repetition and the use of external subordinating conjunctions such as as, and since and internal conjunctive adverbs such as therefore. For example, the first opinion given in CRU 18 develops from the statement of the law in CRU 12 and then through the application of that law to the facts in CRUs 17 and 17a. Similarly, the second opinion in CRU 21 develops from CRU 12 (L) and CRUs 20-20b (F), and the last opinion in CRU 24a develops from the law stated in CRUs 9-9b through the application of the law to the facts in CRU 24.

Not surprisingly also, this student text displays similar patterns to the lecturers' texts in its employment of conjunction as a textual resource (see Table 5.5, p. 166; and Table 6.6 below). Student "J" uses 24 conjunctions to link the 40 CRUs isolated in this analysis, which includes only one implicit link, four "and"s, and roughly equal numbers of internal and external conjunction (9 & 11, respectively). The "J" text is also dominated, as expected, by consequential and comparative types of conjunction with by far the majority realised as consequence conjunctions (9) such as as and therefore, followed by similarity and contrast conjunctions (3 each), and 2 internal additive conjunctions.

<table>
<thead>
<tr>
<th>STUDENT</th>
<th>Total</th>
<th>consequential</th>
<th>comparative</th>
<th>additive</th>
<th>temporal</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;J&quot;</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>578 words (CRUs 40)</td>
<td>9 internal</td>
<td>45.8% (n = 11)</td>
<td>25% (n = 6)</td>
<td>25% (n = 6)</td>
<td>4.2% (n = 1)</td>
</tr>
<tr>
<td></td>
<td>11 external</td>
<td>12.5% contng (n = 9)</td>
<td>12.5% contng (n = 3)</td>
<td>16.7% &quot;and&quot; (n = 4)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>4 &quot;and&quot;</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>N = 24 (1 imp)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Regarding the referential links employed by "J", of note is the use of such, which occurs four times in the text (in CRUs 17, 21, 23, 23a) with two of these being realised as as such. This referent is apparently more frequent in legal contexts as is the incidence of certain prepositional expressions such as as to, which also occurs in this student's text (CRU 15).

The "J" text is similar also to the previous student text ("K") as well as the lecturers' texts in the extent of clausal embeddings and projected clauses. This feature contributes a great deal to the lexical density of the text, helping to shape it as fairly formal written text. In the "J" text, there are 14 clausal embeddings or projections in CRUs 2, 5, 6, 7, 9b, 12, 14, 15a, 17a, 19, 19a, 24 and in five of these, the relative clause follows a legal term and a preposition, such as breach of which... (CRUs 5, 6, 15a), terms of which... (CRU 2) and remedy for which... (CRU 7).
Regarding ideational resources, the "J" text is notable again for its considerable use of classifiers which, as we have also previously found, appear to be prominently employed in these types of texts. Table 6.7 (below) lists their use in this text. As can be seen, there are 25 instances of classifiers in 16 different expressions in this text which parallel the incidence noted in the lecturers' texts. Not surprisingly, the majority involve the classification of legal terms and concepts, such as types of terms, contracts and damages and are primarily located in the sections which discuss the relevant law (L).

Table 6.7: Classifier-Thing

<table>
<thead>
<tr>
<th>Classifier-Thing</th>
<th>CRU</th>
</tr>
</thead>
<tbody>
<tr>
<td>written contract</td>
<td>(2, 3, 13)</td>
</tr>
<tr>
<td>implied terms</td>
<td>(3a)</td>
</tr>
<tr>
<td>previous dealing</td>
<td>(3a)</td>
</tr>
<tr>
<td>trade practice requirements</td>
<td>(3a)</td>
</tr>
<tr>
<td>collateral statements</td>
<td>(3a)</td>
</tr>
<tr>
<td>oral contract</td>
<td>(3a)</td>
</tr>
<tr>
<td>inanimate term</td>
<td>(4a, 7)</td>
</tr>
<tr>
<td>innocent party</td>
<td>(5, 6, 8, 9b)</td>
</tr>
<tr>
<td>punitive damage(s)</td>
<td>(10, 24)</td>
</tr>
<tr>
<td>non-pecuniary loss</td>
<td>(11, 23)</td>
</tr>
<tr>
<td>pecuniary damages</td>
<td>(12)</td>
</tr>
<tr>
<td>usual course</td>
<td>(12, 17a)</td>
</tr>
<tr>
<td>expressed term</td>
<td>(14)</td>
</tr>
<tr>
<td>economic loss</td>
<td>(17a)</td>
</tr>
<tr>
<td>alternative accommodation</td>
<td>(19a)</td>
</tr>
<tr>
<td>contract law</td>
<td>(24)</td>
</tr>
</tbody>
</table>

Finally, in terms of interpersonal features, the "J" text is in accord with the lecturers' texts in displaying appropriate prominence to the system of modality particularly in the application of the law to the problem facts (F) and opinion (O) stages. Table 6.8 (below) illustrates the incidence of modal expressions in this text. As expected, modalizations of probability (14) outnumber modulations of obligation (6), with the majority of expressions of modality being finite modal verbs though there are a range of other modal expressions such as the modal adjective obvious and metaphorical realisations like I consider (explicit subjective) and are seen to be and is reasonable to be (explicit objective) which can be glossed as probably is, obviously are, and probably is, respectively.

The values of the types of modality also resembled those of the lecturers' texts, with the majority of the modulations of obligation being outer values and the vast majority of the modalizations of probability being median ones. Most of the former group also occurred in the sections of the text that outlined the relevant law (L) while the latter were predominantly found in the application of the law to the facts (F) and opinion (O) stages of the text. The student's text is entirely in harmony, then, with the expression of modality recorded by the lecturers in their suggested answers to questions in this genre.
Table 6.8: Modality (Text "J")

<table>
<thead>
<tr>
<th>Modality</th>
<th>CRU</th>
<th>Modality</th>
<th>CRU</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mo = modalization of probability</td>
<td>Mo = modulation of obligation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mu(*) = modulations of potentiality</td>
<td>Nu = modulation of obligation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>h = high value</td>
<td>m = median value</td>
<td>l = low value</td>
<td></td>
</tr>
</tbody>
</table>

(a) Finite Modal Operators (implicit, subjective)

<table>
<thead>
<tr>
<th>Finite Modals</th>
<th>Modality</th>
<th>CRU</th>
<th>Finite Modals</th>
<th>Modality</th>
<th>CRU</th>
</tr>
</thead>
<tbody>
<tr>
<td>must be determined</td>
<td>Mu(h)/Mu(h)</td>
<td>2</td>
<td>can be</td>
<td>Mu(l)/Mu(l)</td>
<td>3a</td>
</tr>
<tr>
<td>would have been</td>
<td>Mu(m)</td>
<td>9b</td>
<td>should be completed</td>
<td>Mu(m)</td>
<td>14</td>
</tr>
<tr>
<td>can be fulfilled</td>
<td>Mu(*)</td>
<td>16</td>
<td>would have been</td>
<td>Mu(m)</td>
<td>17a</td>
</tr>
<tr>
<td>would be</td>
<td>Mu(m)</td>
<td>19a</td>
<td>would not succeed</td>
<td>Mu(m)</td>
<td>20</td>
</tr>
<tr>
<td>would not have been</td>
<td>Mu(m)</td>
<td>20b</td>
<td>would not succeed</td>
<td>Mu(m)</td>
<td>21</td>
</tr>
<tr>
<td>would fail</td>
<td>Mu(m)</td>
<td>22</td>
<td>would fail</td>
<td>Mu(m)</td>
<td>24a</td>
</tr>
</tbody>
</table>

(b) Other Modal Expressions (including Metaphorical realisations)

<table>
<thead>
<tr>
<th>Other Modals</th>
<th>Modality</th>
<th>CRU</th>
<th>Other Modals</th>
<th>Modality</th>
<th>CRU</th>
</tr>
</thead>
<tbody>
<tr>
<td>allows</td>
<td>Mu(l)</td>
<td>5, 6</td>
<td>repudiate</td>
<td>Mu(*)</td>
<td>5, 8</td>
</tr>
<tr>
<td>restricted to</td>
<td>Mu(h)</td>
<td>11</td>
<td>are seen to be</td>
<td>Mu(h)</td>
<td>12</td>
</tr>
<tr>
<td>is reasonable to be</td>
<td>Mu(m)</td>
<td>12</td>
<td>able to</td>
<td>Mu(*)</td>
<td>17a</td>
</tr>
<tr>
<td>I consider</td>
<td>Mu(m)</td>
<td>18</td>
<td>required</td>
<td>Mu(h)</td>
<td>19, 19a</td>
</tr>
<tr>
<td>obvious</td>
<td>Mu(h)</td>
<td>19a</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

(a) implicit/subjective realisations (i.e. modal verbs)

<table>
<thead>
<tr>
<th>modulation (Mu)**</th>
<th>low</th>
<th>median</th>
<th>high</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
</tbody>
</table>

(b) other modal expressions

<table>
<thead>
<tr>
<th>modulation (Mu)**</th>
<th>low</th>
<th>median</th>
<th>high</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2</td>
<td>-</td>
<td>3</td>
</tr>
</tbody>
</table>

** modulations of potentiality, i.e. Mu(*) not included

Overall, student "J" has achieved a very good mark considering she did not cover two of the issues outlined by the lecturer who set this question. She did, however, cover the two most important parts of the question both accurately and thoroughly, and most importantly, in an entirely generically appropriate manner. The student has not only adopted the standard generic structure for her answer, but has also displayed an appreciation of the many lexico-grammatical and discourse features associated with writing in this genre: in short, she has learned to write like a lawyer. This, it is contended, has strongly influenced her final mark as compared to her colleagues whose grip on both the genre and content was less secure, resulting in quite mediocre marks.
6.5 Discussion

The foregoing analyses have demonstrated that the marks that these students received reflected not just their knowledge of the content of the C165 course relevant to the examination question asked, but also their ability to formulate their answers in ways that are considered appropriate to this genre; that is, to reason and write like a lawyer. While demonstration of accurate knowledge of the relevant law is clearly important, so too is the demonstration of legal reasoning and thinking involved in the process of reaching conclusions on the matters raised in the problem question. This is standardly achieved by following the series of stages outlined in the previous two chapters. Students who do not follow this generic staging like students “E” and “K”, although they may know quite a lot of accurate law relevant to the question at hand, will not achieve good marks. Clearly, students who may structure their answer appropriately but lack the ability to express the law accurately and fully and thus realise the lexical and grammatical requirements of the genre (such as student “A”) also will not achieve very good marks.
CHAPTER 7
CONCLUSION

7.1 Summary of principal findings

The results of the questionnaire and interview investigation (discussed in Chapter 1) of students who had not performed well in the final examination for Principles of Commercial Law (C165) suggest that many students (both Australian and overseas) experience difficulty adjusting to the special demands of legal study, but perceptions vary considerably between students who are native speakers of English (NS) and students from other languages and cultures (NNS). Non-native speakers are more aware and concerned about problems at the lexical and semantic level of legal language while native speakers of English are more aware and concerned about problems at the discourse and genre level. Both groups see the need for more guided instruction and practice within the course, particularly with writing acceptable answers to legal problem questions which comprise a large part of the assessment (in assignments, tutorials and the final examination).

Analyses of model or suggested answers to legal problem questions set in the C165 course by lecturers either as tutorial, assignment or examination questions (discussed in Chapters 4 & 5) confirm the generic structure proposed by Howe (1990): Forecast/Overview - F/O, Issue - I, Law - L, Authority - A, Application of Law to Facts - F, Opinion/Advice - O; and also, the somewhat simpler structure outlined by Gaskell (1989) as: Problem/Issue, Proposition, Authority, Application. This is the prototypical pattern although variation occurs in some contexts depending on the area of law and type of problem as well as the intended audience\(^1\). Thus, F/O, I, and A can be optional, and the units that form the "central nucleus" of the text (i.e. L, A, and F) can occur in different order\(^2\). In problems that involve a variety of issues, the central units are recursive covering each issue in turn either reaching individual conclusions of opinion, O, for each issue or if they are interconnected, leading up to a final statement of opinion or advice, O, on the question at hand.

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\(^1\) Howe (1990: 224) quotes Williams to the effect that the issue(s) sometimes may not be stated when the relevant law pertaining to a problem question is clear. She also notes that professional legal writers tend to be briefer than student writers and when writing for fellow experts assume many points, including the issues (p. 234).

\(^2\) Statutory authority often precedes the statement of the law (Howe, 1990: 228) and in problem answers organised around "the facts as they occur" (as in the lecturer "N" text), the application to the facts (F) unit generally precedes the enunciation of the law and its authority.
The schematic structure or "generic structure potential" of answers to legal problem questions can thus be represented as follows:

\[(F/O)^n \times \{(I)^r\}[L \times (A) \times F]^o\]

where (after Hasan, 1978):
- \(\times\) = mobility
- \(\{\}\) = optional elements
- \(\wedge\) = fixed order
- \(n\) = recursivity
- \(\{\}\) = scope of recursivity
- \(\{\}\) = scope of mobility

and F/O represents the Forecast/Overview stage, I the Issue(s), L the relevant Law, A the Authority for the law, F the Application of the law to the problem Facts, O the final Opinion or Advice.

Legal problem question answers are organised in two main ways: they are either structured around Issues or around Facts. The first is the prototypical pattern with the identification of the issues being regarded as the primary task of the law student when analysing these questions: to separate the non-material facts from the material ones, i.e. the facts that have legal significance and around which the resolution of the case revolves. Thus, the units that comprise the statement of the Issues, I, are typically the basic building blocks of this type of discourse, and parallels the Issues or matters to be resolved by the court in the closely related genre of the legal judgment (Maley, 1985).

The second pattern may be chosen when problems involve a complicated chain of interrelated events and facts which all have legal significance and there is logic in dealing with these "as they occur" (as in the lecturer "N" text), commencing the text with a Forecast/Overview, F/O, unit which foreshadows the area(s) of law to be discussed.

These two ways of constructing legal problem question answers are also reflected by an analysis of thematic development. Thematically, legal problem question answers are constructed primarily around the central legal concepts or issues pertaining to the problem; that is, the legal terms, principles and propositions relevant to the problem rather than the facts and events of the case or the parties involved which figure prominently only in the Application of the Law to the Facts, F, sections of the text. However, texts which are largely organised around "the facts as they occur" such as the "N" text employ exophoric reference to the facts of the problem question as their main points of departure and "given" information with the rhemes exploring the legal significance of those facts as "new" information.

The problem questions themselves are clearly composed of two units: the Situation and the Instruction, as Howe (1990) points out, and the overall features of legal problem
questions are summarised in Table 7.1 (below). The Situation is a narrative, the circumstances and facts of the case such as would be gathered by a lawyer from an interview with a client whereas the Instruction is the academic instruction regarding the task to be performed, which is usually to advise the client or clients on their legal position. The student’s task is, in effect, to simulate the role of a lawyer. The Situation may be extremely long and detailed with carefully written events and facts that resemble those of a number of important previous cases; it may contain considerable irrelevancies for students to sift through and it may also have some important omissions of detail which students are expected to identify and comment upon accordingly regarding the differing outcomes depending on the actual situation.

These, it would appear, are typical features of legal problem questions set for law students (Davis, 1994: personal communication). The legal problem questions set for non-law students such as those in this study who were Commerce students studying introductory business law are a mixture of the typical questions as outlined above and other much briefer and less complicated single issue or area of law problems in tutorials (as in the lecturer “S” question) and examination questions (as in the lecturer “G” question) as a concession to the non-specialist status of the students involved.

**Table 7.1: Legal Problem Questions**

(i) Generic Unit: Situation

<table>
<thead>
<tr>
<th><strong>Content</strong></th>
<th><strong>Lexicogrammar</strong></th>
<th><strong>Discourse</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>circumstances and facts of case (sometimes long &amp; detailed; facts often resemble previous cases; may contain many irrelevancies &amp; intentional omissions of detail; names often satirical)</td>
<td>mixture of informal and more formal lexis (eg. technical legal terms) mostly material processes in past tenses often contains adverbial &amp; prepositional phrases of time and space</td>
<td>personal reference chains (parties in the dispute) external conjunction, sometimes temporal</td>
</tr>
</tbody>
</table>

(ii) Generic Unit: Instruction

<table>
<thead>
<tr>
<th><strong>Content</strong></th>
<th><strong>Lexicogrammar</strong></th>
<th><strong>Discourse</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>instruction regarding task to be performed (usually very brief &amp; to advise client on his/her legal position)</td>
<td>imperative mood</td>
<td>usually the final sentence of the problem question</td>
</tr>
</tbody>
</table>

Other features of the legal problem question include a propensity for some degree of register shifting (see lecturer “N” question) with topical allusions and satire (especially in the choice of names of people and places) and informal lexis juxtaposed with much more formal lexis and expressions specific to the legal domain. The Situation is largely written in the past tense and utilises personal reference for the parties in the dispute as
well as temporal phrases and conjunction in the case of problems with long and detailed sequences of events.

The answers to legal problem questions, similarly, show consistent patterns in terms of content and form through which the schematic units of this genre are realised. These patterns are summarised in Table 7.2 (below). Some features, such as personal reference and lexical repetition, apply across the whole text while others are significant defining components of the various individual stages or moves that make up this genre. The Issues, for example, are typically expressed as either a direct or indirect question in the present tense, usually with whether whereas Forecast/Overview units are typically present tense declarative statements of the areas of law that are relevant to the answer.

Table 7.2: Legal Problem Question Answers

(i) Generic Unit: Forecast/Overview (F/O)

<table>
<thead>
<tr>
<th>Content</th>
<th>Lexicogrammar</th>
<th>Discourse</th>
</tr>
</thead>
<tbody>
<tr>
<td>areas of law relevant to the answer</td>
<td>declarative statements usually in the present tense</td>
<td>usually the opening move in the discourse, if present</td>
</tr>
</tbody>
</table>

(ii) Generic Unit: Issues (I)

<table>
<thead>
<tr>
<th>Content</th>
<th>Lexicogrammar</th>
<th>Discourse</th>
</tr>
</thead>
<tbody>
<tr>
<td>legal issues relevant to the answer</td>
<td>usually a direct or indirect question in the present tense, typically with whether</td>
<td>usually the opening move in the discourse, if no F/O move present this move may be recursive</td>
</tr>
</tbody>
</table>

(iii) Generic Unit: Law (L)

<table>
<thead>
<tr>
<th>Content</th>
<th>Lexicogrammar</th>
<th>Discourse</th>
</tr>
</thead>
<tbody>
<tr>
<td>detailed elaboration of the rules and principles of relevant law</td>
<td>declarative statements usually in the present tense often uses passive voice negatives reasonably common mixture of material and relational processes often with clausal embedding specialised technical legal lexis predominates frequent classifiers use of vague words such as reasonable features specific to the legal domain such as archaism, doublets, binomials, complex prepositions, and uncommon cohesive devices sometimes occur modulations of obligation and necessity occur usually as outer values</td>
<td>usually proceeds from the general to the specific use of lexical repetition and parallelism use of human &amp; non-human reference chains (shorter) use of external &amp; internal conjunction thematic development around legal terms or propositions this move is often recursive</td>
</tr>
</tbody>
</table>

The discussion of the relevant Law is also in the present tense and tends to proceed from the general to the specific; that is, the general rule or principle is expounded first followed by the inevitable exceptions or qualifications. Other prominent features of this
stage of the text include a significant employment of the passive voice because the focus is on the principles of law that have evolved and not on the courts and human participants who have advanced them. Negative polarity is sometimes employed so that principles and concepts of law are defined and advanced in terms of what they are not. The verbal processes are an equal mixture of material and relational processes which commonly involve traditional metaphors such as *to draw the line*, probably reflecting the antiquity of the law.

Another feature of the statement of the relevant *Law* can be related to other forms of legal discourse such as legal documents and statutes in that there is often considerable clausal embedding. Also, the lexis is largely technical and specialised, and organised taxonomically which often involves the use of classifiers such as *voidable*, and *pecuniary*. Similarly, features like the use of deliberately vague terms such as *reasonable* appear alongside precise legal terms. Apparent also are archaisms, doublets, binomials, and uncommon prepositional expressions and cohesive devices like *estoppel, null and void, by and against, but for*, and *such* respectively, which have all been noted before as peculiarities of the legal domain.

Modality also plays a part in the statement of the relevant *Law* with modulations of obligation and necessity predominating. These statements of decided law are almost all expressed as outer values (i.e. either high or low), for what one *must* or *is required to* do and what one *may* or *is allowed to* do, and involves both finite modal verbs as well as metaphorical realisations of modulation such as *liability* and *voidable*. The outer values indicate that the rights and obligations as set out in the decided body of law are quite definite and precise.

The citing of *Authority* for the legal propositions is usually in the past tense for what the court decided in another similar case and is either cited parenthetically or locatively. In the latter case, it often occurs as marked theme for seminal or leading cases (particularly in the “S” and “N” texts).

Marked themes such as *In this case* (CRU 26, lecturer “S” text) and *Applying the rule to the claims by M. University* (CRU 22, lecture “G” text) may define both paragraph and schematic boundaries to end the discussion of the relevant *Law* and commence the *Application to the Facts* stage of the answer. Parallel structure is also utilised in the first example to link the new stage to the previous discussion of the *Law* and its leading *Authority* (marked themes in CRUs 20 & 23a). As mentioned above, themes in the *Application to the Facts* sections of these texts are predominantly the facts, events or
parties in the dispute and are quite often in marked position as adjuncts or introductory subordinate clauses, especially in the "G" and "N" texts.

The *Application to the Facts* and the *Opinion* stages of these texts involve considerable amounts of modality. The tenses of the verbal groups in the sections which apply the law to the *Facts* are a mixture of past and present perfect tenses because the focus here is on the facts and events of what the parties did or what has been done.

<table>
<thead>
<tr>
<th>Table 7.2 (cont'd): Legal Problem Question Answers</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>(iv) Generic Unit: Authority (A)</strong></td>
</tr>
<tr>
<td><strong>Content</strong></td>
</tr>
<tr>
<td>case and statute authorities relevant to the answer</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
</tbody>
</table>

| **(v) Generic Unit: Application to Facts (F)**   |
| **Content**                                      | **Lexicogrammar**                  | **Discourse**                        |
| legal concepts & principles in the Law move are  | declarative statements usually     | use of lexical repetition and        |
| applied systematically to the material facts of  | 'in past and perfect tenses        | parallelism                          |
| the problem in order to reach conclusions about  | mixture of material and            | use of long human reference          |
| the parties' legal positions                     | relational processes               | chains (the parties) & shorter       |
| assumptions may be necessary                     | often with clausal embedding       | non-human reference chains           |
| because of insufficient factual details          | mixture of general and legal       | and exophoric reference to the       |
|                                                 | lexis, the latter having features  | facts                               |
|                                                 | as described above in the Law      | mixture of external & internal       |
|                                                 | move                               | conjunction, predominantly           |
|                                                 | modality very significant,         | consequential and comparative        |
|                                                 | with modalizations of              | reasoning patterns often             |
|                                                 | probability predominating,          | syllogistic (involving L, F,         |
|                                                 | usually as finite verbs            | & O moves; lexical cohesion          |
|                                                 | (typically would) and median in    | and conjunction) and usually         |
|                                                 | value                               | explore alternative arguments        |
|                                                 |                                    | thematic development around          |
|                                                 |                                    | facts, events or parties and         |
|                                                 |                                    | often in marked position,            |
|                                                 |                                    | especially at paragraph and          |
|                                                 |                                    | move boundaries                      |
|                                                 |                                    | this move is often recursive         |

| **(vi) Generic Unit: Opinion (O)**                |
| **Content**                                       | **Lexicogrammar**                  | **Discourse**                        |
| final statement of opinion or advice regarding    | invariably modalised               | usually utilises internal            |
| the parties' legal position, usually very brief   |                                    | conjunction: typically *thus,*       |
|                                                  |                                    | *therefore,* and *in conclusion*     |
|                                                  |                                    | this move may be recursive           |

In these sections, modalizations of probability predominate over modulations with the former largely realised through finite modal verbs, such as *would*, and are nearly always of median value. This is in contradistinction with the pattern found in the *Law* section and highlights the essential uncertainty in outcomes, i.e. the contestability, which goes to the heart of the adversarial system of law. Apart for one text ("S"), little support has
been found for the intertwining of modulation and modalization reported by Maley (1989: 82) in the reasoning of legal judgments where the former is typically "prefaced by or qualified by" modalizations. Furthermore, there were relatively few examples of explicitly subjective modality in the lecturers' texts. Expressions such as *I think* and *In my opinion*, which are a feature of legal judgments (Maley, 1985; 1989), are not so prominent in this genre.

In fact, there appear to be two different traditions with regard to the use of personal pronouns in this genre. There is one tradition, which the lecturer "S" text follows, in which part of the answer is an explicit simulation of a lawyer advising a client on their legal position. This tradition is clearly from the oral tradition of the law school (it was also written as an example of an answer to a tutorial problem question) in that the tenor shifts from a mixture of first and third person throughout the text to the final advice which is in the second person, thus simulating the actual words of advice that would be offered to the client, although it is not punctuated as direct speech. The use of the first person continues the judicial practice reported by Maley (1989: 71) of each judge deciding the law "as he himself understands it to be". This tradition, then, is in stark contrast to the impersonality and objectivity that is a consistent feature of much formal writing in academic contexts. The "G" and "N" texts adopt this latter approach and contain no shifts in person; i.e. they are consistently third person and objective throughout.

Legal reasoning is an essential component of the *Application of the Law to the Facts* sections of these texts. The chief linguistic resources that are employed in its realisation are conjunction and lexical and structural repetition. By far the dominant categories of conjunction in these texts are *consequential* and *comparative*, with consequence (typically *because* and *as*) and condition (typically *if*) conjunctions forming the bulk of the former group and contrast (typically *but* and *however*) and similarity conjunctions comprising the latter. Other types of conjunction (such as *temporal* and *manner*) may play a more important role depending on the nature of the problem (such as the "N" question) but the *consequential* and *comparative* categories still predominate with easily the most numerous conjunctions being consequence ones.

An important method of reasoning that was reported by Howe (1990) and confirmed in this study is the use of deductive syllogisms that employ lexical repetition and parallelism and conjunction across the *Law, Application to the Facts, and Opinion* units of these texts. The major premiss is usually made in the *Law* section, followed by a minor or subordinate premiss in the *Application to the Facts* which may include a condition, consequence or comparison utilising external subordinating conjunctions.
such as if, because, and as while the final statement of Opinion is typically preceded by an internal consequence conjunctive such as therefore or thus.

The Application to the Facts stage may involve the making of explicit assumptions because insufficient information is given in the problem question as discussed above. It may also include the exploration of alternative possibilities or positions which highlights the "dialectic nature of the law" and the fact that the final Opinion is far less important than the process of legal reasoning whereby alternative arguments are examined and evaluated against existing legal principles and authority.

Analyses of four students' attempts at writing answers to legal problem questions under examination conditions reveal different degrees of understanding of how to construct generically appropriate answers to problem questions. All four students displayed some knowledge of relevant legal principles and authorities (i.e. content) but this by itself will not necessarily ensure a good mark if the appropriate generic staging is not followed. This staging is part of the process of demonstrating sound legal reasoning because the task is fundamentally about "reasoning like a lawyer" in order to reach conclusions of legal opinion or advice for clients.

If students do construct their answers according to the generic structure and even reach accurate conclusions (as student "A" mostly did) but fail to satisfy the content requirements of the genre, not surprisingly they will also not perform very well. The lowest scoring student on this question clearly fell into this category. The two students ("E" & "K") who achieved more middle of the range marks produced texts that were rather mixed. Although there was quite a degree of knowledge of relevant content (principles and cases), it was not developed and structured appropriately. These students left out vital stages like elaborating the relevant law L before trying to apply it and/or ordered their answers in inappropriate ways such as by commencing with the final stage of opinion O rather than following the necessary steps of reasoning that lead to conclusions of legal opinion or advice. The result was that their answers are somewhat confused and inaccurate and thus achieved only fair results.

On the other hand, the student that achieved the highest mark on this question ("J") demonstrated clearly that she understood the requirements of writing in this genre. Her answer was structured entirely appropriately including all necessary stages and in appropriate order. She also satisfied the requirements regarding content accuracy and appropriateness for the most important parts of the problem producing a well-reasoned answer. However, she did not address the last two issues identified by the lecturer at all, yet still received a very good mark. Considering that the last two issues were much
more minor points of law and that the student had answered the major parts of the problem so well (i.e. generically appropriately), it is not surprising that she scored a high mark especially as it would appear that the structuring of her answer was in marked contrast to so many other students like “E” and “K”.

7.2 Pedagogical implications

The first and most obvious pedagogical implication of this study is the need for both content specialists and language specialists to make the requirements of this writing task more explicit for the vast majority of students. Many authors (Ballard and Clanchy, 1988; Thorp, 1991; Iedema, 1993) argue that becoming literate at university involves a “gradual socialization into a distinctive culture of knowledge”. However, the rules of the culture are seldom made explicit for students and the socialisation process is thus largely unconscious. What operates instead is “the paradox of expertise” (Lundeberg, 1987) where the subject experts have forgotten the progression of their knowledge and skills from their undergraduate days and are consequently unable to describe and teach how they read and write effectively in their discipline.

Lundeberg (1987) has shown that the reading strategies of expert law faculty can be taught to novice undergraduates and reading comprehension significantly improved as a result. Volet (1992) has also demonstrated the effectiveness of modelling and coaching of metacognitive strategies for enhancing university student learning. Linguistic studies of texts that law students must read (statutes and case law - Bhatia, 1983b, 1989, 1993; Maley, 1985, 1989) and write (legal problem answers - Howe, 1990; Beasley, 1993; and the present study) thus have great pedagogical implications for the improved teaching and learning of students by making the structure of legal texts more accessible and explicit. As Neisser (as quoted in Widdowson, 1983) puts it, “we can only see what we know how to look for”.

Thus, students studying law subjects (law students as well as non-law students such as the Commerce students in this study) need to be provided with more guided practice in and explication of the features, constraints and communicative purposes of the genre of legal problem question answers. However, as Iedema (1993: 86-87) observes, students studying in English for Academic Purposes (EAP) courses and preparing to enter tertiary study are rarely given discipline-specific language training. Consequently, if these courses wish to better prepare students for the real demands of tertiary study and enable them to make a smoother transition and better ensure their success, they need to address the “language requirements of a particular ‘discourse community’ ... [and] be sensitive to the rhetorical conventions prevalent in such a discourse.” Thus, EAP
courses for Commerce or business students should incorporate instruction in genres such as the legal problem question which these students will encounter.

Not only should ESL/EFL students be better prepared for entry to tertiary study, but the language support (e.g. in adjunct classes with a language specialist) and the formal content instruction from the course lecturers provided for all students should be informed by explicit attention to the discourse conventions of the various genres of the discipline. Bhatia (1993) writes of the need to move from mere description in language teaching to explanation and proposes genre analysis as a means to that end. The generic structure proposed in this study and the lexico-grammatical and discourse features pertaining to each generic unit which are summarised in this chapter in Tables 7.1 and 7.2 provide the necessary framework and details towards realising this task for the legal problem genre for students studying law subjects.

Students need instruction based on the analysis of actual texts (both lecturers’ model or suggested answers and students’ answers) rather than “simplified versions” or simple accounts” of these texts (Widdowson, 1978: 88). Bhatia (1993: 146) cautions against the use of either because of the danger of “loss of generic integrity, resulting from the simplification of an original text”. In order to make real texts more accessible to students (both in the language class and in the mainstream), he advocates the use of “easification devices” (Bhatia, 1983b) which lay out and diagram the words of complex texts such as statutes in such a way that the structure of the main provisionary clause and its numerous qualifications is more immediately transparent and thus comprehensible.

Legal problem answer texts can be made more accessible to students by simply laying out and labelling and diagramming the texts according to their generic units or schematic structure along the lines of the lecturers’ and students’ texts analysed in this study in the preceding chapters. Crosling and Murphy (1994: 124 & 148-151), while not actually adopting a genre-analytic approach, do use real texts (student and lecturer) and label and annotate them according to their structural “formula”, drawing attention to appropriate language forms in the process. There is a clear need for more worked examples of generically appropriate model or suggested answers to be used in teaching with the generic structure, features and communicative purposes made apparent and accessible to students. The work in this study contributes significantly towards meeting this need.

The questionnaire study revealed that second language learners’ awareness of difficulties with legal language centred primarily on the lexico-grammatical level. Crosling and Murphy’s handbook for business law students (1994) contains a useful chapter on coping with legal vocabulary which explores common legal nouns and verbs, and
vocabulary building and decoding through contextual and derivational strategies. It does not, however, give a genre-based explanation of grammatical forms as advocated by Bhatia (1993: 156-7) who contends that features such as nominalization "carry genre-specific restricted values rather than general grammatical values" and therefore the teaching of general grammar is likely to be of limited value as "the explanation for the use of any aspect of syntax in ESP comes from the analysis and understanding of the genre in which it is conventionally used".

The detailed analysis of the legal problem question genre in this study has attempted to account for and explain the many lexico-grammatical and discourse features (such as tense selection, thematic progression, passive voice, modality etc.) identified in these texts in the light of the part they play in realising the purposes of the genre. It therefore forms a solid basis for more effective language instruction for English for academic legal purposes courses and adjunct courses for students studying law.

This study lends support to the observations of many others including Swales (1990: 206) that many students lack awareness of the role and importance of metadiscoursal signals in academic texts and the "need to keep the readership aware of what is going on". It would appear that students are often focussed primarily on content and "getting the right answer" rather than the structure, logic and process of framing an appropriate answer in the particular genre required.

This study also suggests that students need guidance and instruction in understanding notions of intertextuality between related legal genres. Bhatia (1993: 175) writes that in legal English courses "learners are never given an opportunity to appreciate the essential intertextual relationship between the various genres and the purpose they serve in a variety of legal settings". There is evidence from this study (see lecturer "G" comments in Chapter 5) that some students are unaware of the features and purposes of legal case genres such as the legal judgment and case notes which are derived from it and have conflated these with the answering of legal problem questions. There is an obvious need to identify and relate the various genres involved in legal education such as case law, legislation, legal documents, textbooks and the various assignment tasks such as writing case notes, legal essays, and the answers to legal problem questions. As Bhatia (1993: 180) observes:

In order to understand the nature and function of legislation, the learner must develop a capacity not only to appreciate how specific facts of the world are used to create legal relations but also to apply specific legal provisions to relevant facts of the world. Therefore, specialist learners must be trained to handle both - legislative provisions so that they can apply such legal relations to the facts of the world outside, and legal cases so that they can perceive legal relations from the facts of the world.
Previous studies (Maley, 1985 & 1989; Howe, 1990; Korner, 1992; Iedema, 1993) have all identified the important role that modality plays in legal texts. The answering of legal problem questions is no exception. Iedema (1993: 106) has shown that non-native students writing case notes may inappropriately employ many high value modal choices such as modalizations like "will" and "always" in the making of generalisations. Two of the student texts in this study ("A" and "K") also displayed some modal inappropriacies. The complex and subtle system of modality is clearly an area that needs attention in EAP and adjunct classes for students who are or will be undertaking legal study. Lecturers also need to exercise care in the formulating of assignment and essay questions because of the potential ambiguity that modality provides, as the misinterpretation of the wording of the exam problem question by student "K" demonstrates.

7.3 Implications for further research

More research is needed in exploring academic legal genres in general because very little work has so far been done by linguists in this area and students mostly get very little explicit instruction from subject specialists in these areas. There is a need to further explore the legal problem question answer genre as well. The observations and generalisations made in the course of this study need to be further refined or confirmed by a much larger corpus of lecturer and student "model" answers in order to determine their archetypicality. For example, it would be interesting to determine the relative incidence of problem answers that are structured around Issues as against those that are structured around Facts. Are there clear and identifiable differences between the questions set and the answers accepted and expected from students who are non-law students such as those in this study and the questions set and the answers accepted from law students? This study certainly suggests that there are.

More research is needed to ascertain the nature and extent of the reported differences in the writing of answers to legal problem questions between experts and novices, "the progression in style from the novice to the expert" (Howe, 1990: 234). How much and in what ways does an expert's style of writing alter when these texts are written for a specialist rather than a neophyte audience? How true also is Farrar's (1977:49) claim that formal deductive logic only applies to clear and well established cases and principles in the law? There was considerable evidence in this study to support Howe's (1990) conclusion that deductive syllogisms are an important part of the legal reasoning process but is this a feature that distinguishes expert and novice legal problem questions and answers?
Also of interest is the general acceptance or otherwise of the intuitively logical proposition that legal problem answers should deal with the issues in the order of their importance (Davis, 1994, personal communication). Furthermore, are there identifiable differences between the types of legal questions set and the structuring of answers across differing areas of law, criminal, civil, constitutional apart from the degree of reliance on case and statutory authority?

The two traditions in use that were identified in this study in the employment of personal pronouns warrant further investigation. Is the simulation of the actual words of advice to the "mock client", and the shift of tenor that results, a feature of the oral tradition of the law school translated to the written medium and how widely accepted is this style of writing and teaching? Is its use primarily confined to law schools as opposed to law taught to non-law students?

Further work is needed in exploring the intertextuality of the genres encountered by students in their legal studies because there is clear evidence that students do not always appreciate their points of similarity and difference. The present study hopefully provides a sound basis to build upon in exploring other related academic legal genres.
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APPENDIX

Appendix 1

Questionnaire
C165 Students, Semester 2, 1991

Please answer the following questions about yourself and your experiences with C165:

1. Have you studied any law subjects before? Yes/No
   If yes, give details...

2. Is English your first language? Yes/No
   If no, what is your first language and your nationality?

3. Have you found C165 to be harder than other subjects? Yes/No
   If yes, please explain how and why it is harder than other subjects...

4. Did you expect to pass C165? Yes/No
   Why? (Please justify your answer...)

5. Did you find C165 lectures difficult? Yes/No
   Why? (Please explain)

6. Did you find C165 tutorials difficult? Yes/No
   Why? (Please explain)

7. Did you find the C165 textbooks difficult? Yes/No
   Why? (Please explain)

8. Did you find C165 exams difficult? Yes/No
   Why? (Please explain)

9. Did you experience problems with any of the following in C165? (If yes, please elaborate)
Please rank the above problems in order of significance (1-12) according to your experiences in C165. (Place 1 against the most important problem for you down to 12 for the least important)

Do you have any useful advice for future students of C165? Yes/No

I agree to my C165 data being used for this study on the condition that strict confidentiality is maintained

Signed _____________________________
Appendix 2

Questionnaire results

C165 Students, Semester 2, 1991

<table>
<thead>
<tr>
<th>Question 1</th>
<th>L1 (N=16)</th>
<th>L2 or Biling (N=10)</th>
<th>TOTAL (N=26)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Have you studied any law subjects before?</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>0</td>
<td>16</td>
<td>1</td>
<td>9</td>
</tr>
<tr>
<td>(0%)</td>
<td>(100%)</td>
<td>(10%)</td>
<td>(90%)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question 2</th>
<th>L1 (N=16)</th>
<th>L2 or Biling (N=10)</th>
<th>TOTAL (N=26)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Is English your your first language?</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(61.5%)</td>
<td>(38.5%)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>3 Indian</td>
<td>3 Chinese</td>
<td>4 Malay/Indonesian speakers</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Question 3</th>
<th>L1 (N=16)</th>
<th>L2 or Biling (N=10)</th>
<th>TOTAL (N=26)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Have you found C165 to be harder than other subjects?</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>5</td>
<td>11</td>
<td>8</td>
<td>2</td>
</tr>
<tr>
<td>(31.3%)</td>
<td>(68.7%)</td>
<td>(80%)</td>
<td>(20%)</td>
</tr>
</tbody>
</table>

Some L1 Comments

* It is hard to remember all the cases.
* The essay writing was different and made it hard to determine what was required.
* I personally found it harder... my other subjects were quite similar in subject matter and style to my TEE subjects...
* Understanding the legal language and being able to define legal terms...
* ...difficult to express the factual-like information learnt throughout the semester into an appropriate exam answer.

Some L2 Comments

* Legal language - grammar (sic). Most importantly students should be warned that a DICTIONARY meaning does not explain the formal legal meaning.
* difficult in understand the concept
* I need to memorize cases and the legal concepts instead of just understanding them like in other subjects.
* lots of facts to be memorised
* ... a lot of cases to study
* harder for me to understand concepts
* ... more analyticental (sic) skills compared to other introductory courses, but luckily it's more interesting as well.
* ... a lot of words or terms that are very difficult for me to understand.
Question 4

<table>
<thead>
<tr>
<th>Did you expect to pass C165?</th>
<th>L1 (N = 16)</th>
<th>L2 or Biling (N=10)</th>
<th>TOTAL (N=26)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Yes No</td>
<td>Yes No</td>
<td>Yes No</td>
</tr>
<tr>
<td></td>
<td>13 3</td>
<td>9 1</td>
<td>22 4</td>
</tr>
<tr>
<td></td>
<td>(81.3%) (18.7%)</td>
<td>(90%) (10%)</td>
<td>(84.6%) (15.4%)</td>
</tr>
</tbody>
</table>

All students (except 1 ESL student) failed the exam.

Overall grades for C165 course:

L1 students - 10 Passes and 6 Fails
L2 students - 1 Credit, 2 Passes, 2 Conceded Passes, 5 Fails.

Some Comments:

* I knew I didn’t explain enough in the questions. (L1)
* found difficulty in understanding terminology and certain terms (L1)
* because I have never failed anything before (L1)
* I believe that I have put enough effort to obtain it. (L2)
* Attended nearly every tutorial. Attempted most tutorial exercises. Up to date (consistent with the readings).
* I didn’t study enough - concepts hard to understand.

Question 5

<table>
<thead>
<tr>
<th>Did you find C165 lectures difficult?</th>
<th>L1 (N = 16)</th>
<th>L2 &amp; Biling (N=10)</th>
<th>TOTAL (N = 26)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Yes No</td>
<td>Yes No</td>
<td>Yes No</td>
</tr>
<tr>
<td></td>
<td>2.5 13.5</td>
<td>5.5 4.5</td>
<td>8 18</td>
</tr>
<tr>
<td></td>
<td>(15.6%) (84.4%)</td>
<td>(55%) (45%)</td>
<td>(30.8%) (69.2%)</td>
</tr>
</tbody>
</table>

Some Comments:

* certain lectures yes others no! (L1)
* sometimes it was difficult to pick up what was happening... (L1)
* the sheets that were given out were excellent and the lecturers usually explained them quite adequately. (L1)
* because you must read before the lecture, otherwise you will lose the interest. (L2)
* the lecturer often just explained the concepts very briefly, expecting us to be prepared before the lecture. Even if we were prepared, I think it is a bit difficult. (L2)
* Because some words or items are difficult to understand. (L2)
* Yes and No. Just some legal vocabulary was new to me... and am not used to lateral thinking. (L2)
### Question 6

<table>
<thead>
<tr>
<th>Did you find C165 tutorials difficult?</th>
<th>L1 (N=16)</th>
<th>L2 &amp; Biling (N=10)</th>
<th>TOTAL (N=26)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>6 (37.5%)</td>
<td>4 (40%)</td>
<td>10 (38.5%)</td>
</tr>
<tr>
<td>No</td>
<td>10 (62.5%)</td>
<td>6 (60%)</td>
<td>16 (61.5%)</td>
</tr>
</tbody>
</table>

**Some Comments:**

* the tutor went into great details about the concepts and I lost track of what was happening and where we were going. (L1)
* the actual answer plan to questions - applying legal principles. (L1)
* tutor was good and explained things with more depth. (L1)
* I found it difficult to explain and decipher legal expressions, and fully understand what the question wanted. (L1)
* Because you had to participate quite vocally and I'm not the most vocal sort of person. (L1)
* as I never really was in the tutorial discussion and it too began to get hard to follow although I did gain more understand (sic) of the course through them. (L1)
* Most of the questions have a straight forward answer. Some are very tricky and deceiving and it requires much practice to enable to answer it. (L1)
* Once again we have to be prepared... However, often the lecturer's attitude was 'intimidating' on the students. (L1)
* wasn't sure how to answer questions. (L2)
* not really, but it would be better if I had tried working it out with other tut students, but unfortunately, there's no rapport among the students. (L2)
* because they teach too fast. (L2)
* The lecturer... used to "beat around the bush" in trying to explain a specific point of law. (L2)

### Question 7

<table>
<thead>
<tr>
<th>Did you find the C165 textbooks difficult?</th>
<th>L1 (N=16)</th>
<th>L2 &amp; Biling (N=10)</th>
<th>TOTAL (N=26)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>3 (18.7%)</td>
<td>8 (80%)</td>
<td>11 (42.3%)</td>
</tr>
<tr>
<td>No</td>
<td>13 (81.3%)</td>
<td>2 (20%)</td>
<td>15 (57.7%)</td>
</tr>
</tbody>
</table>

**Some L1 Comments:**

* It was a law book which used very vague (sic) terms and 'lawyer phrases' which was hard to follow to a certain extent.
* They explained everything very well.
* It was just a matter of sitting down reading and concentrating.
* Latimer (i.e. the textbook) contained extended long sentences which used words that required some knowledge of law.
* very straight forward.

**Some L2 Comments:**

* I encountered many new legal terms and its way of expressing things are
* The language used was very high...
* Especially the Red Book supplied by the University.
* Some cases are hard/difficult to understand and follow.
* Latimer is difficult to use but easy to understand.
* hard to understand
* Often, jargons (sic) a lot, specific use of language tedious sometimes but overall textbook is well organised.
Question 8

<table>
<thead>
<tr>
<th>Did you find the C165 exams difficult?</th>
<th>L1 (N=16)</th>
<th>L2 &amp; Riling (N=10)</th>
<th>TOTAL (N=26)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>12.5</td>
<td>6.5</td>
<td>19</td>
</tr>
<tr>
<td>No</td>
<td>3.5</td>
<td>3.5</td>
<td>17</td>
</tr>
<tr>
<td>(78.1%)</td>
<td>(65%)</td>
<td>(35%)</td>
<td>(73.1%)</td>
</tr>
<tr>
<td>(21.9%)</td>
<td>(35%)</td>
<td>(65%)</td>
<td>(26.9%)</td>
</tr>
</tbody>
</table>

Some L1 Comments:

* I hadn't really been in a situation in which we had to apply the legal information we had learnt in the course.
* We had to know every little details (sic) and authorities which became confusing when dealing with a number of issues.
* I found the cases easy but didn't really know where to start and how much detail to go into with the examples (questions).
* I had prepared for it quite extensively, but panicked and got confused.
* I found the final exam fairly difficult but that was probably a result of lack of study.
* Being only 3 questions there was no room for error. Understanding the progression of the cases which I was required to analyse was difficult.
* Because I found it difficult to answer all facets of the question. Also, having only 3 questions, made it easier to fail.
* Because of the pressure to remember so much meant that all the areas I had to cover were not well known.
* Exam questions seemed to be very vague. Need more practice answering exam type questions, possible for assessment throughout the course so you have an idea what to write.

Some L2 Comments:

* Because question is not straight forward.
* I didn't find it hard. The only problem was it was very tricky. I realized this after the exam from a friend, then I came to discover that some of my answer was inaccurate.
* It was a bit difficult from the past 2 or 3 years. It wasn't very straight forward cases...
* The problem questions were difficult.
* wasn't sure how to answer questions.
* only one section, the rest is pretty straight forward and predictable from past years papers.
* because I could not understand the topic.
Question 9

Did you experience problems with any of the following in Cl65?

Problems ranked in order of significance 1 to 12, most important to least important according to students' experience.

(i) legal language (archaisms, jargon, formal vocabulary) (50%) (50%) (70%) (30%) (57.7%) (42.3%)

<table>
<thead>
<tr>
<th></th>
<th>L1 (N=16)</th>
<th>L2 &amp; Biling (N=10)</th>
<th>TOTAL (N=26)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal language</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>(archaisms, jargon, formal vocabulary)</td>
<td>8</td>
<td>8</td>
<td>7</td>
</tr>
<tr>
<td>Mean Ranking</td>
<td>$X = 7.1$</td>
<td>$X = 5.6$</td>
<td>$X = 6.5$</td>
</tr>
<tr>
<td>(N=14, S.D.=3.9)</td>
<td>(N=10, S.D.=4.6)</td>
<td>(N=24, S.D.=4.2)</td>
<td></td>
</tr>
</tbody>
</table>

Some L1 Comments:

* can be a little confusing (4th)
* the legal jargon I could usually understand (12th)
* the legal jargon was difficult to fully comprehend (3rd)
* the meanings of phrases and words (7th)
* confusing (1st)
* the legal jargon which we had no knowledge of as yet (5th)

Some L2 Comments:

* legal terminology hard to understand (1st)
* especially formal vocabulary (6th)
* difficulty in understand jargon and vocabulary (1st)

(ii) the grammar & structure of legal language (textbook (37.5%) (62.5%) (70%) (30%) (50%) (50%)

<table>
<thead>
<tr>
<th></th>
<th>L1 (N=16)</th>
<th>L2 &amp; Biling (N=10)</th>
<th>TOTAL (N=26)</th>
</tr>
</thead>
<tbody>
<tr>
<td>the grammar &amp; structure of legal language (textbook) (37.5%) (62.5%) (70%) (30%) (50%) (50%)</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Section of statutes, case excerpts</td>
<td>Mean Ranking</td>
<td>Mean Ranking</td>
<td>Mean Ranking</td>
</tr>
<tr>
<td>$X = 7.0$</td>
<td>$X = 3.8$</td>
<td>$X = 6.1$</td>
<td></td>
</tr>
<tr>
<td>(N=15, S.D.=3.6)</td>
<td>(N=10, S.D.=3.4)</td>
<td>(N=25, S.D.=3.8)</td>
<td></td>
</tr>
</tbody>
</table>

Some L1 Comments:

* my grammar is bad (1st)
* sometimes (9th)
* I found statutes difficult to interpret and understand (4th)
* language appeared old-fashioned which provided some difficulty (1st)
* sometimes I didn't understand the explanations (12th)
* the cases in the textbook didn't discuss the terms and concepts (4th)

Some L2 Comments:

* but really very put off by details and length of case studies (5th)
* mainly statutes are a bit hard to understand (2nd)
* some textbook explanations are not clear (1st)
* case excerpts, section of statutes, explanations (6th)
* sections of statutes (2nd)
(iii) the rhetoric and logic of the judge’s argument in cases

<table>
<thead>
<tr>
<th></th>
<th>L1 (N=16)</th>
<th>L2 &amp; Billing (N=10)</th>
<th>TOTAL (N=26)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes/No</td>
<td>Yes/No</td>
<td>Yes/No</td>
<td>Yes/No</td>
</tr>
<tr>
<td>Mean Ranking</td>
<td>7.6</td>
<td>4.8</td>
<td>6.75</td>
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<td>(N=10, S.D.=3.6)</td>
<td>(N=24, S.D.=3.3)</td>
<td></td>
</tr>
</tbody>
</table>

Some L1 Comments

* sometimes it was hard to follow and the result different to what I had expected. (6th)
* depending on the cases (4th)

Some L2 Comments

* only when I'm not sure of legal concepts. (5th)
* frequently don’t understand judge’s decision (have to ask tutor). (2nd)

(iv) identifying the ratio decidendi of a case

<table>
<thead>
<tr>
<th></th>
<th>L1 (N=16)</th>
<th>L2 &amp; Billing (N=10)</th>
<th>TOTAL (N=26)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes/No</td>
<td>Yes/No</td>
<td>Yes/No</td>
<td>Yes/No</td>
</tr>
<tr>
<td>Mean Ranking</td>
<td>7.3</td>
<td>7.3</td>
<td>7.3</td>
</tr>
<tr>
<td>(N=14, S.D.=3.4)</td>
<td>(N=9, S.D.=3.8)</td>
<td>(N=24, S.D.=3.5)</td>
<td></td>
</tr>
</tbody>
</table>

Some L1 Comments

* just had a real problem here (2nd)
* in some cases I found identifying difficult due to the ambiguities involved. (5th)
* I was still sometimes uncertain as to how the conclusion was reached.
  Sometimes it seemed as though there was no right or wrong answer. (2nd)
* in some cases I wasn’t sure what the ratio decidendi was. (3rd)

Some L2 Comments

* Some yes. (4th)
* due to language problem. (5th)

(v) differentiating material facts from non-material (irrelevant) facts in a case

<table>
<thead>
<tr>
<th></th>
<th>L1 (N=16)</th>
<th>L2 &amp; Billing (N=10)</th>
<th>TOTAL (N=26)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes/No</td>
<td>Yes/No</td>
<td>Yes/No</td>
<td>Yes/No</td>
</tr>
<tr>
<td>Mean Ranking</td>
<td>8.9</td>
<td>9.1</td>
<td>9.0</td>
</tr>
<tr>
<td>(N=14, S.D.=3.2)</td>
<td>(N=9, S.D.=3.0)</td>
<td>(N=23, S.D.=3.1)</td>
<td></td>
</tr>
</tbody>
</table>

Student Comments:

* I think the problem is that I need more practice doing so. (L1) (-)
* sometimes but not often (L1) (8th)
* some yes (L2) (4th)
Some L1 Comments

* Some cases I felt could apply to any number of problems. (1st)
* There were so many different areas to know thoroughly. (3rd)
* Occasionally some cases may appear similar. (2nd)
* Sometimes my areas of law got rather mixed up with each other. (-)
* Realising the involved laws I found difficult to define. (2nd)
* Some questions touched on more than one area. (1st)
* also sometimes I placed cases in the wrong area of law. (4th)
* sometimes. (5th)

Some L2 Comments

* due to the not straight forward question. (11th)
* Either we miss the area completely or we miss part of it. (1st)
* sometimes can get a little confused especially torts. (2nd)

<table>
<thead>
<tr>
<th></th>
<th>L1 (N=16)</th>
<th>L2 &amp; Biling (N=10)</th>
<th>TOTAL (N=26)</th>
</tr>
</thead>
<tbody>
<tr>
<td>identifying the</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>area(s) of law at</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>issue in a case</td>
<td>11</td>
<td>5</td>
<td>15</td>
</tr>
<tr>
<td>or problem</td>
<td>(68.75%)</td>
<td>(31.25%)</td>
<td>(57.7%)</td>
</tr>
<tr>
<td>question</td>
<td>(40%)</td>
<td>(60%)</td>
<td>(42.2%)</td>
</tr>
<tr>
<td></td>
<td>Mean Ranking</td>
<td>Mean Ranking</td>
<td>Mean Ranking</td>
</tr>
<tr>
<td></td>
<td>X = 4.9</td>
<td>X = 6.1</td>
<td>X = 5.5</td>
</tr>
<tr>
<td></td>
<td>(N=15, S.D.=3.5)</td>
<td>(N=9, S.D.=3.3)</td>
<td>(N=24, S.D.=3.5)</td>
</tr>
</tbody>
</table>

Some Comments:

* on some occasions. (L1)
* sometimes to a small extent. (L1) (2nd)
* sometimes the cases given by the lecture (sic) for a given legal issue are different from the cases on textbook on that same issue. (L2) (8th)

<table>
<thead>
<tr>
<th></th>
<th>L1 (N=16)</th>
<th>L2 &amp; Biling (N=10)</th>
<th>TOTAL (N=26)</th>
</tr>
</thead>
<tbody>
<tr>
<td>understanding the</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>significance or</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>importance of a</td>
<td>2</td>
<td>14</td>
<td>4</td>
</tr>
<tr>
<td>particular case</td>
<td>(12.5%)</td>
<td>(87.5%)</td>
<td>(15.4%)</td>
</tr>
<tr>
<td></td>
<td>(20%)</td>
<td>(80%)</td>
<td>(84.6%)</td>
</tr>
<tr>
<td></td>
<td>Mean Ranking</td>
<td>Mean Ranking</td>
<td>Mean Ranking</td>
</tr>
<tr>
<td></td>
<td>X = 7.0</td>
<td>X = 8.75</td>
<td>X = 7.6</td>
</tr>
<tr>
<td></td>
<td>(N=14, S.D.=2.9)</td>
<td>(N=8, S.D.=2.8)</td>
<td>(N=22, S.D.=2.95)</td>
</tr>
</tbody>
</table>

Some Comments:

* Unsure how to write the answers. What format to use. (L1) (8th)
* I also mixed up some legal principle in one area of law with another. (L1) (3rd)
* Once again there were a lot of legal principle to know. (L1) (2nd)
* If we can identify the area of law correctly, there'll be less problem. (L2) (3rd)
* some - yes (very few (L2) (-)
<table>
<thead>
<tr>
<th>(ix)</th>
<th>L1 (N=16)</th>
<th>L2 &amp; Biling (N=10)</th>
<th>TOTAL (N=26)</th>
</tr>
</thead>
<tbody>
<tr>
<td>giving relevant legal definitions and principles</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>(12.5%)</td>
<td>(87.5%)</td>
<td>(30%)</td>
<td>(70%)</td>
</tr>
<tr>
<td>when answering problem questions</td>
<td>Mean Ranking</td>
<td>Mean Ranking</td>
<td>Mean Ranking</td>
</tr>
<tr>
<td>$\bar{X}$ = 6.7</td>
<td>$\bar{X}$ = 6.4</td>
<td>$\bar{X}$ = 6.6</td>
<td></td>
</tr>
<tr>
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<td>(N=8, S.D.=2.6)</td>
<td>(N=22, S.D.=2.4)</td>
<td></td>
</tr>
</tbody>
</table>

**Some L1 Comments**

* I didn’t have enough knowledge to back up questions with principles. (2nd)
* Trying to quote definitions and cases and similar cases to the question has never been good to me. (2nd)
* the legal language may (sic) it difficult. (5th)

**Some L2 Comments**

* I find memorising facts very difficult (1st)
* ... if the area is identified, then it’s just a matter of reciting what can be memorized. (9th)

<table>
<thead>
<tr>
<th>(x)</th>
<th>L1 (N=16)</th>
<th>L2 &amp; Biling (N=10)</th>
<th>TOTAL (N=26)</th>
</tr>
</thead>
<tbody>
<tr>
<td>citing relevant cases when answering legal problem questions</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>(56.5%)</td>
<td>(43.75%)</td>
<td>(30%)</td>
<td>(70%)</td>
</tr>
<tr>
<td>Mean Ranking</td>
<td>Mean Ranking</td>
<td>Mean Ranking</td>
<td></td>
</tr>
<tr>
<td>$\bar{X}$ = 4.9</td>
<td>$\bar{X}$ = 5.75</td>
<td>$\bar{X}$ = 5.2</td>
<td></td>
</tr>
<tr>
<td>(N=14, S.D.=3.6)</td>
<td>(N=8, S.D.=1.9)</td>
<td>(N=22, S.D.=3.2)</td>
<td></td>
</tr>
</tbody>
</table>

**Some L1 Comments**

* Again I felt the could be applied to other legal problems and there were a lot to remember. (2nd)
* There were a lot of cases to know and they get confused together. (1st)
* I saw every case as being different and thought that they should be treated differently (2nd)
* There were definitely quite a large number to remember which was a problem for me (-).
* Identifying a similar case in some circumstances was difficult. (6th)
* as I could not remember exactly what cases were in which area except for the main ones. (1st)

**Some L2 Comments**

* It depends on the area of law identified (7th)
* I have difficulty remembering the cases (4th)
* Yes, because of problem of remembering them. (7th)
* Ony in recalling cases - memory retention (-)
organising answers (knowing where to start etc) to legal problem questions

<table>
<thead>
<tr>
<th></th>
<th>L1 (N=16)</th>
<th>L2 &amp; Biling (N=10)</th>
<th>TOTAL (N=26)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>12</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>No</td>
<td>4</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>(75%) (25%)</td>
<td>(60%) (40%)</td>
<td>(69.2%) (30.8%)</td>
<td></td>
</tr>
<tr>
<td>Mean Ranking</td>
<td>X = 4.4</td>
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<td>X = 4.9</td>
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<td>(N=8, S.D.=3.2)</td>
<td>(N=23, S.D.=3.4)</td>
<td></td>
</tr>
</tbody>
</table>

Some L1 Comments

* I didn’t know how much detail to go into (5th)
* It was hard to know where to begin. (1st)
* When first answering questions but began to get better. (3rd)
* I sometimes felt that my answers weren’t structured correctly. (4th)
* I had a problem with keeping my answers short and simple, I have a tendency to ‘waffle’. (-)
* To plan an answer was extremely difficult. (1st)
* Sometimes it is confusing as to which are the most important points. (3rd)
* I had problems in how to structure answers. (3rd)

Some L2 Comments

* Do not know what the lecturer want in answering a question. (7th)
* There wasn’t sufficient practice doing it. (3rd)

identifying when more information is needed to fully answer a problem question and the difference this information would make to the answer

<table>
<thead>
<tr>
<th></th>
<th>L1 (N=16)</th>
<th>L2 &amp; Biling (N=10)</th>
<th>TOTAL (N=26)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>8</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>No</td>
<td>8</td>
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<td>No</td>
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<tr>
<td>(50%) (50%)</td>
<td>(50%) (50%)</td>
<td>(50%) (50%)</td>
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</tr>
<tr>
<td>Mean Ranking</td>
<td>X = 6.1</td>
<td>X = 6.25</td>
<td>X = 6.1</td>
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<tr>
<td>(N=15, S.D.=3.6)</td>
<td>(N=8, S.D.=3.8)</td>
<td>(N=23, S.D.=3.6)</td>
<td></td>
</tr>
</tbody>
</table>

Some L1 Comments

* When I thought that I had completed the question, my tutor would state more and more things that I could have stated. (3rd)
* Whether more facts should be listed or discussed as it was a requirement to discuss issues that weren’t totally relevant to the case. (3rd)
* My answers were a bit too simple, I did not look closely enough at the smaller issues. (-)
* didn’t know my work thoroughly enough. (2nd)
* I knew when I needed more but usually could not give it. (10th)
* There was not enough emphasis placed on the fact that some parts of the question were worth more than others. (1st)

Some L2 Comments

* Often it depends on how well the area is identified and how well I memorize all the important points. Still, often these are not suitable to the markers. (2nd)
* There wasn’t much practice in this area. (1st)
Do you have any useful advice for future students of C165?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>12</td>
<td>4</td>
</tr>
<tr>
<td>(75%)</td>
<td>(25%)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>4</td>
<td>6</td>
</tr>
<tr>
<td>(40%)</td>
<td>(60%)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>TOTAL</th>
<th>(N=26)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>16</td>
</tr>
<tr>
<td>No</td>
<td>10</td>
</tr>
<tr>
<td>(61.5%)</td>
<td>(38.5%)</td>
</tr>
</tbody>
</table>

**Some L1 Comments**

- Read a lot of different cases.
- Learn the work as you go through the course and learn important case examples as they help you learn the work.
- Read all cases; go to all lectures and tutorials.
- It is not adequate to study cases and principles on their own without applying them to cases, and other aspects of commercial law.
- Take the time to revise each area of law and related cases each week as there is too much information to cram before exams.
- Participate fully in tutorials and attend all lectures.
- Study hard and keep up with the course work.

**Some L2 Comments**

- Repeatedly clarify any non-understood facts of the subject.
- Prepare yourself before every lecture and use the tutorial given to you as efficiently as possible.
- Practice more with the tutorial and past year exam papers' questions.
- Learn to make use of the law library, organise own table and list of important case, consistent work.

**Additional Comments re: C165**

**Some L1 Comments**

- No feedback on assignment on why answer was lacking.
- I felt strongly that the structure of the exam did not test the students knowledge, but their ability to be able to write in a 'law context'.
- If each question had more sections rather than one question worth 20 marks. If you don’t get the gist of the question, there’s no way you’re going to pass exams.
- Need more practice at exam type tasks i.e. problem questions involving large numbers of cases, mixing the law together with different legal principles in the one problem.
- Had some problems writing legal English. One or two practice sessions in the first 4 weeks structuring answers to legal problem questions rather than tests would have helped a lot.
- I had no problem understanding the structuring of problem questions but problem was that issues and areas of law were not always identified accurately. What I wrote was different to what the lecturer wrote.
- In the exam, I didn’t know where to start and how much detail to go into. Not enough practice in tutorials at doing problem questions especially writing out answers.
- I got pretty confused learning 60 or so cases I got them mixed up. Need to learn the principles in different cases that distinguish them from similar cases.
- I felt that the exam questions were different to anything else we had done in the course.
- The exam posed problems in a manner I had not seen before and I had very little experience in writing essays in law.
Some L2 Comments

* The exam questions were not straight forward. The ones we did in tutorials were much shorter and closely tied to previous cases. Need more practice at long problems with details.
* Had problems with legal meanings versus everyday meanings.
* Confused on some cases; some support and others contradict.
* We were not told about structuring answers before the assignment. The assignment is completely different from essay question.
* Past exam papers were consistent. This year’s paper quite different; the format was different.
* Had problems looking up law library which is so different from normal library catalogue.
* Not enough communication between students during tutorial. Maybe once or twice we could work together on assignments or group project.
* Legal terminology hard to understand. If you read cases, have to read 3 or 4 times to understand.
* Would like more helpful handouts of more case analyses. Each tutorial only had time to answer 1 or 2 cases.
**Question 9 (in terms of student rankings)**

**Did you experience problems *with any of the following in C165?***

<table>
<thead>
<tr>
<th>RANKING</th>
<th>L1</th>
<th>L2</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>(xi) organising answers (S.D. = 3.4)</td>
<td>(ii) grammar &amp; structure language</td>
<td>(xii) identifying more info needed</td>
</tr>
<tr>
<td>2.</td>
<td>(x) identifying relevant cases</td>
<td>(iii) rhetoric &amp; logic of judge's argument</td>
<td>(x) identifying relevant cases</td>
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<td>3.</td>
<td>(vi) identifying areas of law (S.D. = 3.6)</td>
<td>(vii) applying legal principles</td>
<td>(vii) identifying areas of law</td>
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<td>4.</td>
<td>(xi) identifying more info needed (S.D. = 3.6)</td>
<td>(xii) grammar &amp; structure language</td>
<td>(xii) identifying more info needed</td>
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<td>5.</td>
<td>(vii) applying legal principles (S.D. = 3.3)</td>
<td>(xi) organising answers (S.D. = 4.6)</td>
<td>(xii) identifying more info needed</td>
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<td>6.</td>
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<td>(i) legal language (jargon etc)</td>
<td>(vii) understanding significance of case</td>
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<td>(i) legal language (jargon etc)</td>
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<td>(v) differentiating material from non-material facts</td>
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<td>12.</td>
<td>(x) identifying relevant cases</td>
<td>(i) differentiating material from non-material facts</td>
<td>(x) identifying relevant cases</td>
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</tbody>
</table>

* (xi), (vi), (i) identified as problems for most students.
  (ii), (iii), (xii), (x) identified as problems for about half the students.

** considerable divergence between L1 & L2 students in their rankings and Yes/No responses (i.e. whether a problem or not).
Appendix 3

Lecturer "S" text
TUTORIAL PROBLEM ANSWER (958 words)

I am asked to advise the infant student as to whether:

(a) he is liable for the damage done or the rent due prior to his repudiation of the lease, and

(b) he can recover back the rent he has already paid.

In order to advise the infant it is necessary to consider the law relating to the contractual capacity of infants. Infants are one group of persons whom the law regards as lacking full contractual capacity. The general rule is that any contract made by an infant is unenforceable against the infant. The purpose of the rule is to protect infants from exploitation by allowing them to escape legal liability under any contract they may enter into. But contracts with infants are not null and void. They are simply unenforceable against the infant. Thus, if the contract is performed, anything done under it will be recognised by the courts as having been legally done.

There is an exception to the general rule in the case of contracts for necessary goods and services and/or beneficial contracts of service. Such contracts are enforceable by and against the infant - although the infant need only pay a "reasonable" price regardless of what the contract price was. In addition to these contracts there is a second class of contracts which are not simply unenforceable against the infant, no matter what.

This second class of contracts is more difficult to define. Most of the cases have concerned contracts to lease or purchase land or to purchase shares in a company. However it has also been held that a contract under which an infant joins a partnership and marriage settlement contracts are in this category. All such contracts impose continuing obligations and confer continuing rights upon the parties to the contract. As such the rule is that these contracts are voidable at the election of the infant. But if he does not elect to avoid the contract during his minority (or within a reasonable time of his attaining 18 years) then his right to avoid the contract will be lost and, as an adult, he will be held to the contract and to obligations arising in the future.

If the infant elects to avoid a voidable contract during his infancy or within a "reasonable time" of attaining 18 years then it has been held that he cannot be made liable for any obligations that would have arisen after the date of repudiation. However, in the famous case of Steinberg v Scala it was also established that, if the infant had obtained some benefit under the contract, he cannot recover back money already paid. This is because the contract was perfectly valid at the time it was entered into and thus money paid under it was lawfully the property of the payee. The only exception to this rule being where there is a "total failure of consideration" so that the infant gets nothing of what he was entitled to expect under the contract. In Steinberg v Scala it was said that because the infant had become the legal owner of the shares, even though no dividends were ever paid on them, there had not been a total failure of consideration. The infant got exactly what she had contracted for.

In this case the infant has been in occupation of the flat for two months when he repudiates the contract. Thus there is no total failure of consideration in this case.

I assume that the "infant student" is still an infant when he repudiates. If he is not there may be a question as to whether he can still lawfully repudiate the contract. Has he acted within a reasonable time of reaching 18? I need further information on this point.
On the assumption that the right to repudiate has not been lost, it is clear that all future obligations which would otherwise have arisen under the lease are now discharged. Thus the infant is not liable for rent due in the future. But what about rent due but unpaid at the date of repudiation? Also can he recover back rent already paid?

On the authority of Steinberg's Case it is clear that he cannot recover back the rent already paid since this is not a case in which there has been a total failure of consideration.

On the other hand, the position with rent due but unpaid is more difficult. But he better view seems to be that because contracts which are voidable at the election of the infant are in fact binding on the infant until he repudiates, then any obligation accrued but unsatisfied as at the date of repudiation will have to be honoured.

On this view the infant would not only have to pay the arrears of rent, he would also be liable for damage caused - as that would be an obligation imposed on him by the contract prior to the date of repudiation.

On the other hand, if the effect of the infant's repudiation is to "rescind" the contract (as was said in Steinberg v Scala) there would not be a contract left after repudiation on which the infant would be sued - and thus he would escape liability for the rent unpaid and for the cost of the necessary repairs. Although the matter is unclear, my view is that the infant should be liable for the arrears of rent and the cost of the repairs. Any other result would be most unjust.

In summary therefore, my advice to the infant is:

(a) You cannot recover back the rent already paid because there has not been a total failure of consideration in this case. You have had the use of the flat for at least two months.

(b) It is not certain that you will be liable for arrears of rent or for the cost of repairs - but the likelihood is that you will be liable for both.
The contract in question has obviously been breached. This is not at issue.

The question requires a discussion of the Remedy of Damages for breach of contract.

INTRODUCTION

The purpose of damages in contract is to compensate and not to punish with the main objective being to put the innocent party in the same position as if the contract had been fully performed.

The question requires the discussion of:
1) Different types of damages—particularly pecuniary, non-pecuniary and punitive damages.
2) Remoteness principle,
3) Causation, and
4) Duty of M. University to mitigate.

TYPES OF DAMAGE

Firstly, as already stated, the object of damages is to compensate and not to punish, so M. University would be wasting their time pursuing the claim for $100,000 as punishment to discourage builders from breaking deadlines in the future.

Secondly, a distinction needs to be made between pecuniary and non-pecuniary loss with the latter generally not recoverable for breach of contract.

Pecuniary loss is financial loss ($500,000 for temporary accommodation and $200,000 for extra furnishing cost) whilst non-pecuniary loss is non-financial loss e.g. pain and suffering, loss of enjoyment, vexation etc. ($200,000 for students for frustration and disappointment along with the $50,000 for the loss in staff morale).

NON-PECUNIARY LOSS

Generally, non-pecuniary loss is not recoverable for breach of contract. An exception to this is where the subject matter of the contract is purely for enjoyment/entertainment (Jarvis v. Swans Tours). As the subject matter of the contract (new Commerce building) is not purely for enjoyment/entertainment, the case would not fall within the limited exception. Therefore, the claims for non-pecuniary loss would not be recoverable.

PECUNIARY LOSS

No general bar for recovering pecuniary loss for breach of contract. However, the principles of Remoteness, causation and Mitigation still need to be overcome for a plaintiff to recover.

REMOtENESS

Courts will allow damages to be recovered that are not too remote.
The principle (sic) rule that is used for guidance as to where to draw the line is the rule in *Hadley v. Baxendale*.

There are 2 limbs to the rule in *Hadley v. Baxendale*:

1) damages arising "naturally" or in the "usual course of things" as a consequence of the breach. This limb has been equated with reasonable foreseeability (per *Victoria Laundry v. Newman*).

2) damage not may reasonably be supposed to have been in the contemplation of both parties, at the time when they made the contract.

The first limb covers ordinary type losses whilst the second limb covers "special" losses and consequential damage. These special type losses will normally not be awarded unless the defendant was put on notice of the special circumstances.

Applying the rule to the claims by M. University the $500,000 for erecting temporary accommodation would arise naturally and as a consequence of the breach and so would therefore not be too remote. Hence, the claim would fall within the first limb of *Hadley v. Baxendale*.

The claim for the extra $200,000 it cost to furnish the building would not fall within the first limb of *Hadley v. Baxendale*. The issue is whether it would be covered by the second limb?

As nothing was said concerning such a loss at the time the contract was made, the $200,000 would not fall within the second limb i.e. it would not have been within the contemplation of both parties.

**CAUSATION**

The damages claimed must be caused by the breach.

Clearly the $500,000 for erecting temporary accommodation would not have been a loss "but for" the breach of contract.

On the other hand, CC could argue that the extra $200,000 it cost to furnish the building was not caused by them but was due to the exorbitant inflation rate over the 12 month period. If anything could be said to have caused such a loss it would be government economic policy.

**MITIGATION**

The plaintiff (M. University) has a duty to mitigate their loss. Mitigation requires the plaintiff to take reasonable steps to minimise their loss.

Providing the steps taken by M. by erecting temporary accommodation were reasonable steps to minimise their loss they would have satisfied their duty to mitigate. It is difficult to see what else M. University could have done.

In respect to the extra $200,000 to furnish the building M. may not have discharged their duty to mitigate. For example, it may have been possible for them to purchase the furniture at the original price with it being delivered 12 months later. Or if the suppliers refused to do this, it may have been cheaper for M. to store the furniture.

At the end of the day, M. University would be best advised only to proceed with the claim for the $500,000 it cost to erect the temporary accommodation.
Appendix 5

Lecturer “N” text
ASSIGNMENT PROBLEM ANSWER (947 words)

In order to advise Bruce of his legal position it is necessary to discuss the topics of offer, acceptance and consideration. These subjects cannot be considered in isolation, rather they must be discussed in the light of the facts as they occur.

When George advertises in the West Australian he is making an invitation to treat, Bruce’s tender is on offer. An offer may be defined as an undertaking - “made with the intention (which may be objectively ascertained) that it shall become binding on the person making it as soon as it is accepted by the person to whom it is addressed”1. An invitation to treat is a mere preliminary communication prior to an offer, in other words it invites offers.

George is not legally accepting the tender when he only makes a mental intention to tell Bruce that he accepts. Acceptance must be communicated to the offeror to be effective. The letter of undertaking is an option contract and by signing and returning it to George, Bruce is bound to keep his offer open for two calendar months.

The telephone conversation can be seen either as a request for information, or, more likely as a counter offer. George by wanting the work completed by the end of August is adding an additional term to the contract. The original offer (i.e. the tender) is destroyed and is replaced by the new counter offer. Bruce’s reply is a supply of information if George’s statements had been a request for information but, and again more likely, Bruce’s reply is a new tender or offer. George’s reply is too uncertain to constitute acceptance of this counter offer at this stage.

George’s letter of June 10 could be an acceptance, as acceptance is complete on posting a valid contract would exist at noon on June 10. However the postal rule may be displaced if it is unreasonable to use the post as a means of communication in the circumstances. As George said he would “drop a note in the post” it is probably reasonable to conclude a contract exists on June 10.

An offer may only be revoked before acceptance is completed, thus Bruce cannot escape performance at this stage by saying he was too busy elsewhere.

George’s offer to extend the date for completion is a gratuitous offer on his part. A contract requires consideration to be legally effective and purely gratuitous statements are not legally binding. However in Central London Property Trust Ltd. v High Trees House Ltd.2 (High Trees) it was held that a promise intended to be binding, intended to be acted upon is binding.

George’s promise to forgo completion until the end of September was intended to be binding. He expected Bruce to act upon his statement and Bruce by employing extra men and materials did act upon George’s promise. George’s promise is therefore binding.

However since High Trees was decided, subsequent cases have imposed limitations on this principle. These must now be considered.

1 Latimer p. 227
2 [1956] 1 All E.R. 256
Until the recent High Court decision of Walton Stores (Interstate) Ltd v Maher & Anor\(^1\) the courts had required that the parties had a pre-existing contractual relationship before the doctrine of High Trees (or promissory estoppel as it is sometimes called) could be used. If no contract existed on June 10, Bruce can rely on Walton Stores and should be successful in asking the court to keep George to his gratuitous promise. However, it is more likely a contract did exist and thus no problem arises.

Secondly, it must be unfair for the promisor, George to go back on his promise. Bruce can successfully establish this.

Thirdly, it has traditionally been stated that the doctrine is to be used as a shield and not a sword, in other words promissory estoppel cannot be used as a cause of action. This requirement may be no longer necessary as a result of the Walton Stores decision. However, if Bruce instigates court proceedings, he will be relying on the contract between himself and George. If during the proceedings George attempts to rely on the late completion date as an excuse for non payment, Bruce will defend himself by using promissory estoppel as a shield.

Fourthly, the representation must be clear and unequivocal. George's statement was quite plain, Bruce was being given an extension of time to complete the contract.

Next it may be argued that Bruce relied on George's promise and would have suffered detriment if George had gone back on his promise after the extra men and materials had been arranged. Bruce acted and relied on George's promise by finishing the work by the end of September.

Finally it should be noted that the doctrine is only suspensory in nature. The promisor can resume his original position by giving reasonable, but not necessarily formal notice. This does not apply however if the promisee, Bruce, cannot resume his original position as indeed is the case here. Bruce has acted on the promise and completed the alterations by the end of September and thus obviously cannot return to his original position.

The Walton Stores Case\(^2\) confirms the High Trees principle in Australia. Bruce is safely within the ambit of the doctrine.

In conclusion it may be stated that Bruce is in a strong legal position. Even if he did not have a valid contract on June 10, (which is unlikely) he should be able to rely on the doctrine of promissory estoppel and thus the court would uphold the promise made by George to forgo completion until the end of September.

\(^2\) ibid.
Appendix 6

Student “A” answer
EXAM PROBLEM (460 words)

In these case between M. University v. Cosner Constructions Pty Ltd (CC) we looking to the law of:

*Agreement of contract between both parties in offer and acceptance
*Damages and breach of contract - type of damage on (?) aggravite damages.

So, if we looking to the specific of that contract the CC will completed the building in 1992. In these case, it is agreement of an offer and acceptance.

*An offer ----- is a statement of a contract which a person is to be bound.
*An acceptance ----- is a form of a contract. agreement from the offer.

Which means, University offer a contract to CC to build a building and CC accept that offer. So these, already a contract of both parties which entitle for both parties not to breach the contract. If, one of the parties breach the contract it will bound to the parties who is breach the contract.

But, in fact CC breach the contract, which CC build the building was not completed until February 1993. It is entitle University to sue CC because of breach of contract.

When M. University claims to CC. It is a particular law in Damage.

*Damage ----- is a right for the injured party to have a compensation of his/her losse in the contract.
----- It is not entitle for injured party to get profit from the Compensation of damage.

e.g. case: about damage are:
1. Holiday in V__
----- about a holiday of one of the family was bad tours.
----- the couple sue the agency for refund they money, because of their holiday is very bad.

2. About, the company which the machine mill was break down and need to sharpen it quickly.
----- the company ask to other company to fixed the mill as soon as possible in the next days.
----- But the mill was fix about a week after that.
----- The company sue to that person of the loss profit, because company was closed
----- but the court said: they can not have a profit from claim damage,
----- they only entitle to claim particular area of causes the damage, not from the loss of profit from company.

So, in these example case M. University can only claims to CC only the particular area which causes the damage. The University can not claim for their profitable in:
-$500,000 erecting temporary accommodation
-$200,000 cost of inflation rate over 12 months
-$200,000 compensate the commerce students
-$50,000 for loss in staff morale

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-$1000,000 (sic) punishment to builders.
All these claims are not liable to CC company because of the profit to the University, as we can see the example case of the company want to fix their mill machine.
*The University will not success in these claims.
EXAM PROBLEM (254 words)

Is CC liable for damages and if liable what damages should be paid? Also what type of damages must be paid?

It would seem that M. does not want to repudiate the contract and therefore this part is not pursued.

Claims for damages are assessed by two criteria Causation and Remoteness of Damage. The causation would show that CC breached the contract by not completing the building in the specified time. The court would regard this to be a condition of the contract as in the case of Associated Newspapers v. Brancks. Therefore, M. can claim damages. This was an express term of the contract.

Remoteness of damage show that only the $500,000 for erecting temporary accommodation on campus and the extra $200,000 it cost to furnish the building due to the exorbitant inflation rate over the 12 month period as general damages. The $100,000 as punishment cannot be claimed as Common Law only compensates and Criminal Law only punishes. The $200,000 to compensate Commerce Students and $50,000 for loss of staff morale would have to be Nominal Damages as Non-Pecuniary (Financial) Damages would be able to be assessed. Case supporting Re Polimis.

The foreseeability test would the fact of completing the building late would cause damage to M. The case Hadley v. Baxendale is used the authority. This therefore would required CC to foresee that the would be some damage, although the extent of the damage may have been beyond the contemplation of CC.
Appendix 8

Student "K" answer
EXAM PROBLEM (430 words)

Obviously, on the University's part, they claimed that there is a breach of contract by CC in accordance with the condition of the contract specifying that the building should be completed for occupation in February 1992. If the establishment is true and enforceable, M. University would be entitled to receive damages for the breach of contract as well as the expenses that was incurred due to the breach of contract.

However, according to CC, they would argue that the statement they made clearly indicate that the completion of the contract "should" be ready by February 1992 but they did not specified that it "will" be completed. This would allow the defendant to provide necessary allowance for completion due to circumstances.

Based on my knowledge, I think that M. University should be able to claim compensation on the $500,000 for the election of temporary accommodation and the $200,000 for the additional expenses incurred due to inflation only.

The very fact that the delay in completion of the building caused M. University to incur extra cost in providing temporary accommodation raised the judgement against CC. This could be weigh using the "but for" test which indicate the position of the plaintiff if the defendant has not committed the breach. Similarly, the University should be able to claim compensation on the extra cost incurred due to exorbitant inflation rate. The judgement would be that though CC has no knowledge or could not foresee the increasing inflation rate in the next coming year, however, this expenses could have been avoided if the building is completed on time.

The third claim for the $200,000 is for the non-pecuniary damages that the defendant has caused due to the breach of contract which is intangible. However, the University could not claim damages for something which has not happened yet and no consideration is given in order to establish the stand. This means that the claim is too vague for damages as it does not proved that the plaintiff had gone into some consideration to establish the damages. This is best demonstrated in the case of Swan Tour Pte Ltd where the actual event has occurred and the plaintiff actually suffered for that event.

As regard to the fourth claim on loss in staff morale the damages is considered too remote and invalid in the contract.

Last but not least, the last claim could not be established too as the breach of the contract could only allowed the plaintiff to claim compensation under the rules of damages but not to punish.
Appendix 9

Student "J" answer
EXAM PROBLEM (578 words)

This problem involves the area of Law of Contract and in particularly breach of contract.

The problem concerns a written contract, the terms of which must be determined to be either express or implied. Any terms included in a written contract are expressed whereas implied terms can be due to previous dealing, trade practice requirements or collateral statements (in partly written, partly oral contract). (for example, in Dick Bentley Productions v. Harold Smith Motors).

Once a term has been established it is then classified as either a condition, a warranty or an innominate term. Conditions are very important terms to a contract, the breach of which allows an innocent party to repudiate the contract and/or sue for damages. Warranties are terms of lesser importance, breach of which allows an innocent party to sue for damages only. Innominate terms fall somewhere between conditions and warranties, the remedy for which is determined by the effect of the breach.

If an innocent party chooses to repudiate a contract, it is terminated from that point and releases the parties from any further obligations.

Damages in law of contract are not to punish but to compensate, to place the innocent party in the position which they would have been in had the contract not been breached.

Punitive damage are therefore not relevant to Law of Contract. Also, damages for non-pecuniary loss are restricted to contracts involving enjoyment or entertainment, for example Jarvis v. Swans Tours.

Pecuniary damages are only awarded for losses caused which are seen to be naturally occurring, occurring from the usual course of doing business, (Victoria Laundry case) or losses caused by an event which is, or is reasonable to be, in the contemplation of both parties at the time of entering into the contract (Hadley v. Baxendale).

In the present case, the problem does involve a written contract (assumed) and the fact that it specified that the building should be completed by February 1992, makes that statement an expressed term of the contract.

The requirement as to the time of completion of the work is not a condition of the contract, since breach of which would not render the contract totally different from that which was intended, but is only a warranty. That is, the contract can still be fulfilled regardless of the breach.

As such, the University is only able to sue for damages for breach of the term and only for economic loss occurring naturally, from the usual course of doing business, or that which would have been in the contemplation of both parties at the time of contracting.

Therefore, I consider the $500,000 claim for erecting temporary classrooms as being viable. Since the University specified that the building was required to be finished by February 1992, it is obvious that they intended to use it, and alternative accommodation would be required otherwise.
The $200,000 extra to furnish the building due to inflation, would not succeed since it is too remote, would not have been in the contemplation of both parties initially. Therefore, a claim for such would not succeed.

Claims for $200,000 compensation for students and $50,000 compensation for staff would also fail. Such claims are based on non-pecuniary loss and as such are not applicable to the Law of Contract as concerns this case.

Also, $100,000 as punishment to builders concerns punitive damages which are not covered by contract law, and would therefore fail.