

Shifting identities

Towards a legal discourse
pedagogy

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Simply put one is effectively presented with a choice: change the underlying structuring principle of the school, curriculum or classroom to match the code already possessed by these pupils or develop ways of providing pupils with the key to the code enabling success within those contexts. Unfortunately, the former, often advanced by well informed but misguided educationalists, would effectively relegate subordinate social groups to lower status forms of educational knowledge and hence to the lower rungs of the division of labour; the latter is open to misreading as a deficit theory and requires acknowledging the differential status of different forms of knowledge, an admission considered beyond the pale in much contemporary social science (Maton, K and Muller, J pp. 7-8).

Some quotes

I suggest that issues of identity are not an optional extra for literacy theorists, but are central to a social view of writing. Ivanic R, 1998

...the NLS tradition (New Literacy Studies)...has served to bury the study of language itself, in this case because of the apparent imperative to focus on the social practice that surround the uses of literacy. The pedagogic subject is one preoccupied with the immediate literacy practice such that relatively little interest attaches to any sense of the linguistic system with which one engages in order to construct that practice (Christie, F and Macken-Horarik, M, p. 67)

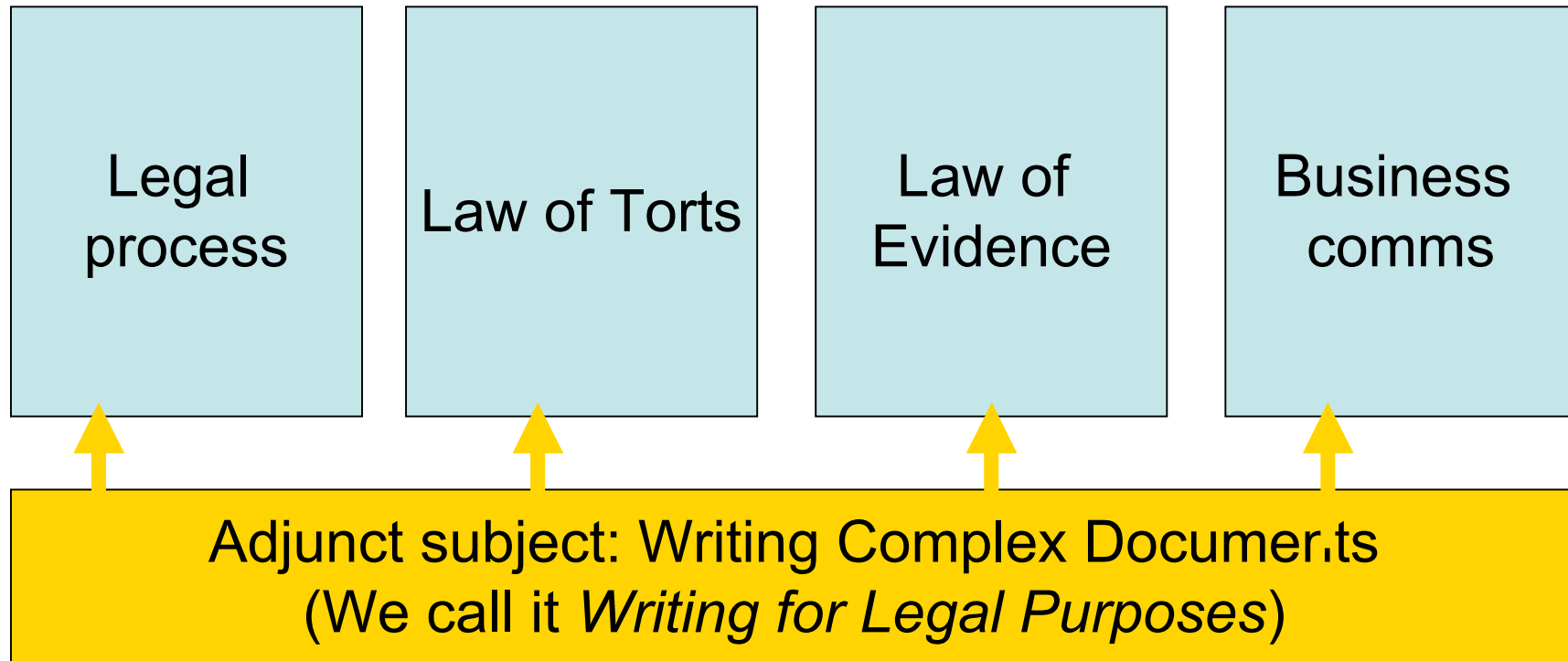
Approach

Discursive approaches to disciplines that make use of the terms ***discursive practice, positioning, subject position*** and ***identity*** may serve to enable students from subordinate groups to access powerful discourses.

Who we are

- Developing an adjunct language subject for students doing an Advanced Diploma in Legal Practice.
- Students may go on to work as paralegals in legal offices or do law degrees and other law related degrees.
- Students primarily from Melbourne's industrial western suburbs, exit year 12 students, some mature age students and some students from other TAFE programs.
- We are teachers in a language and learning unit of a multisectoral university (which ranges from beginner literacy classes to PHD studies); the unit being dedicated to serving the university's commitment to access and success.
- Law teachers requested our assistance because many students have 'literacy problems'

Adding an adjunct subject



Background research

How did we begin to work out what to teach?

- Analysis of student test scripts
- Writing case analysis ourselves
- Literature review

Sample question

Consider these two separate cases. The first involves Wayne, a bank manager who has been charged with fraud and theft from his employer. The second involves Tammy, who is suing a surgeon and a hospital for a cosmetic procedure that went wrong. Determine which party in *each* case bears the legal burden of proof and explain the standard of proof applicable to *each* case.

Student samples

The following samples represent a range of student writing in the course.

Our focus is on students experiencing the greatest difficulties in writing in the subject and most of the samples have been chosen to highlight these difficulties.

A note of caution : we do not wish to give the impression the following samples are representative of student writing in the class as a whole.

Student samples

The common law adversary system used in Australia (except for some tribunals) requires the burden of proof to be borne by the party commencing proceedings. In the instance of Wayne's criminal case the burden of proof is on the prosecution and in Tammy's civil case it is on the plaintiff.

Susan

Student sample

In the case of Wayne, a bank manager who has been charged with fraud & theft from his employer, the legal burden of proof lies with the state, on behalf of Wayne's employer, to prove that he is in fact guilty of the alleged crime/s. As this is a criminal case the standard of proof is of beyond reasonable doubt.

Mohamed

Student sample

In the case of Wayne a manager who has been charged with fraud and theft from his employer. The second involves Tammy who was suing a surgeon and a hospital for a cosmetic procedure that went wrong. Wayne is not honest manager in bank. They should not do it like that complete was wrong for him to thief fraudulent fraud implies absence of honest belief it is a false statements which when made. The legal burden of proof: The burden of proof usually lies on the party asserting or initiating an issue. In a criminal case the prosecution bears the burden. In a civil case the plaintiff bears the burden.

Salvatore

Some comments

- Susan identifies the principle first and then maps the principle onto the case. This mapping of one discourse onto another, we propose, is taking up the identity of the legal expert.
- Other students refer to actors first and then try to associate that with principle.
- Understanding legal reasoning, understanding who one is supposed to be as a legal expert and having the language repertoire to do these things are all mixed together.

problem question – Janet’s case

Janet is a model who is keen to increase the size and shape of her breasts so that she will be more successful in her career. She consults a plastic surgeon who states that he can help her by implanting silicone into her breasts. Janet expresses concern that the implants will be unsafe. The doctor calms her fears by stating that the manufacturer has supplied literature attesting to the safety of the product. Twelve months after the operation Janet finds that the implants have leaked and her doctor advises their removal. The shape of Janet’s breasts is now distorted. Her career is ruined and there is the possibility that her immune system has been affected by the silicone leak.

Determine whether Janet has a case against the plastic surgeon and/or the manufacturer. In your analysis include possible defences against her claim.

Who is the legal advisor?

- To determine the case, students need to understand the context for that determination. This is that they are legal experts in an adversarial legal system which involves
- Identifying the relevant law that applies to the case
- Identifying the issue at stake

Who is the legal advisor?

- Identifying elements of law and tests for elements that must be met for a case to be made:
 - applying elements and tests to the facts of the case
 - considering possible defences and how those defences might be rebutted.
 - making judgements (given all of the above) about the likely success of the case

Issues arising

- Need to negotiate **boundaries** between language teachers and law teachers
- Need for **Collaboration: new Communities of Practice**
- Need to identify **distinctive features of legal reasoning/writing:**
 - Understanding is shown through applying the law and students are assessed on this skill.
 - The distinction between common law and statute law is significant for how legal practitioners and so students write in the law.
 - There are connections between legal reasoning and public reasoning, between legal identities and citizen identities

Modeling a case analysis excerpt from Janet's Case

Area
of
Law

Janet's case involves the Tort of Negligence. Three elements must be established to determine that an action is negligent. First, a duty of care must be established; secondly, it must be shown that the defendant has breached this duty of care; and, thirdly, the plaintiff must have suffered loss or damage as a result of the breach. The issue here is whether Janet has suffered loss or injury as the result of negligence on the part of the manufacturer and/or her plastic surgeon.

Elements of the
law

The
Issue

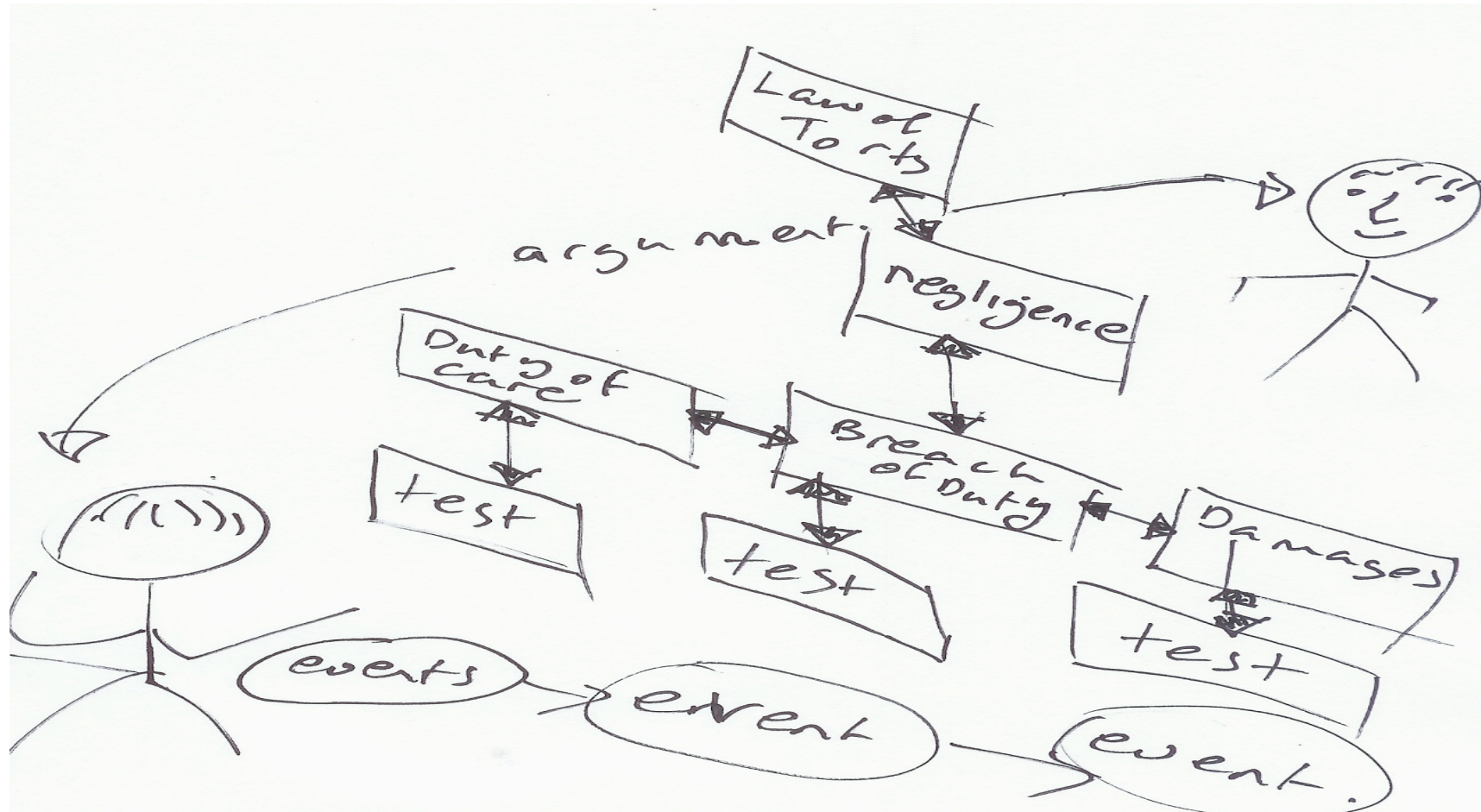
To be successful, Janet must first show that the defendants owed her a duty of care. A test for duty of care is to apply the "neighbour principle" (*Donoghue v Stevenson* [1932] AC 562) and this test contains two parts. First, a duty of care arises where the defendant is in a position to reasonably foresee that failure to take reasonable care may cause injury or damage to the plaintiff. Secondly, there must be sufficient proximity between the plaintiff and defendant/s for these parties to count as "neighbours". One form of proximity is where a manufacturer owes a duty to the consumer to ensure that a product can be safely consumed (*Donoghue v Stevenson* [1932] AC 562; *Grant v Aust Knitting Mills* [1933] 50 CLR 387). On this basis, Janet will be able to establish that the manufacturer of silicone breast implants owed her a duty of care.

First test for
duty of care

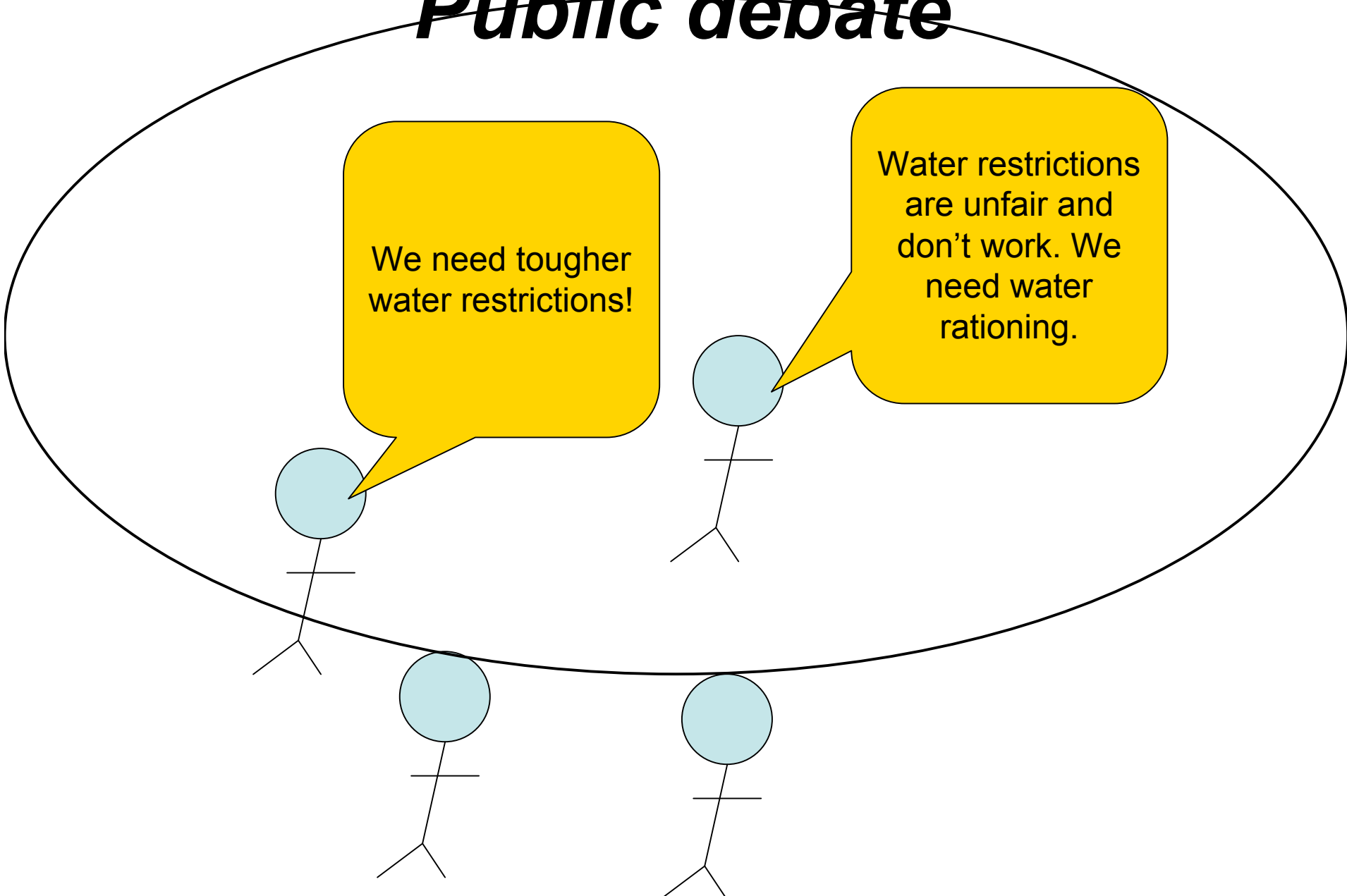
Applying the
law

Cite cases &
conclude
paragraph with
predictive
statement

Legal text- mapping discourses and argument



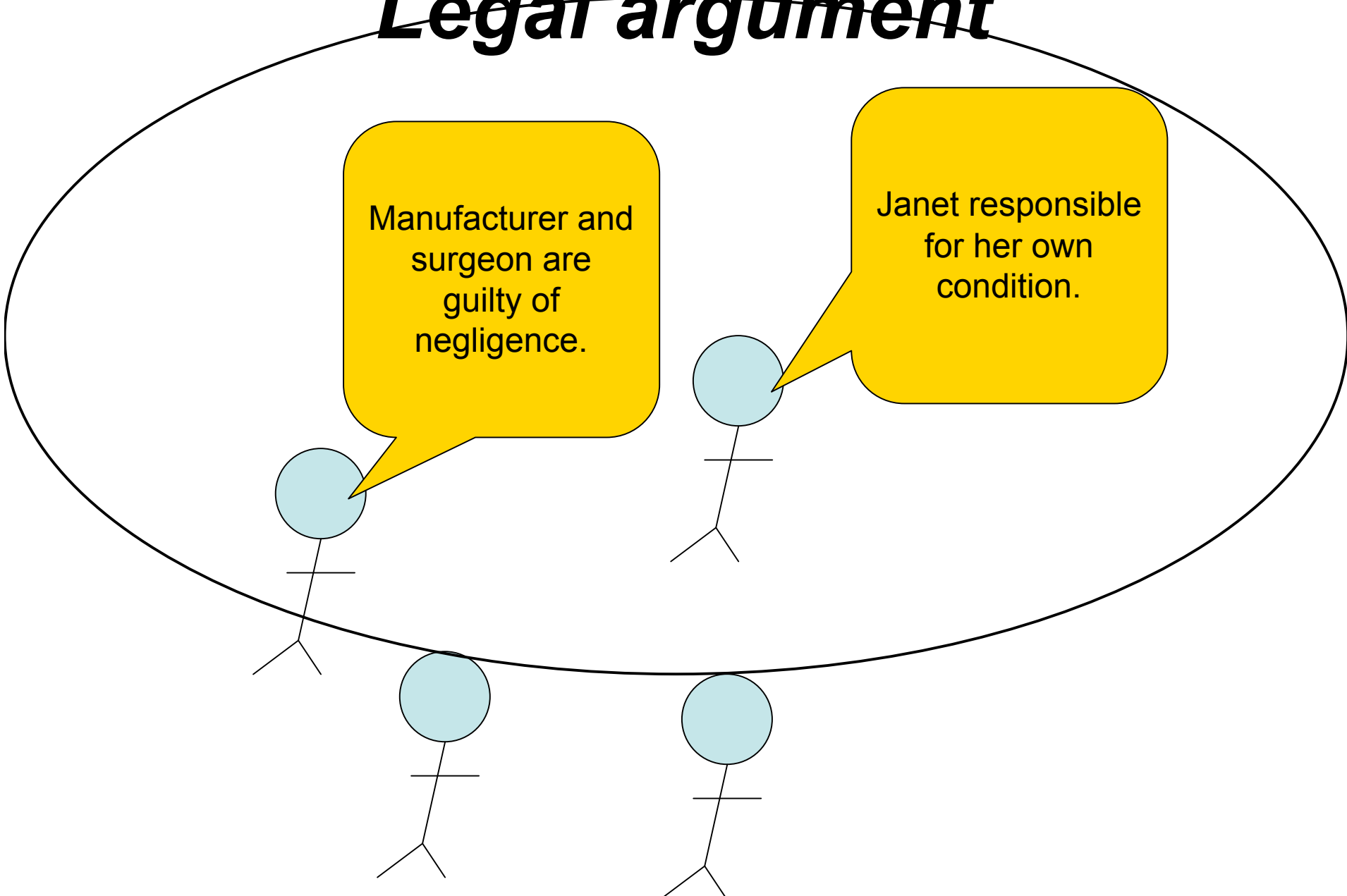
Public debate



We need tougher water restrictions!

Water restrictions are unfair and don't work. We need water rationing.

Legal argument



Manufacturer and surgeon are guilty of negligence.

Janet responsible for her own condition.

Case analysis #1

In my opinion Janet has got a good case against the surgeon and the manufacturer. If I were to go to a plastic surgeon and he told me that I would be okay after plastic surgery and then it turns out that I'm wrecked by it I'd sue him as well. And he would deserve it. In fact something like that happened to a mate of mine. He did his knee playing footy and was told by a surgeon that he could fix it by putting an artificial ligament in. It turned out not to work and now my mate is going to need a new knee. He's talking about suing the surgeon as well.

Modeling a case analysis excerpt from Janet's Case

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First test for
duty of care

Applying the
law

Cite cases &
conclude
paragraph with
predictive
statement

Sample structure for Janet case

- Introduction
 - Describe the area of law and state the issue in legal terms
 - Identify the elements comprising this area of law
1. To be successful Janet must show ... (refer to first element)
 - Explain test for element (refer to the relevant principle of law)
 - Does this apply to manufacturer? Does it apply to the surgeon?
 2. Janet must also show ... (refer to second element)
 - Explain test for element 2 - Does this apply to manufacturer? Does it apply to the surgeon?
 3. Thirdly Janet must show that... (refer to third element)
 - Explain test for element 3 - Does this apply to manufacturer? Does it apply to the surgeon?
 4. Finally Janet must show that... (refer to fourth element)
 - Explain test for element 4 - Does this apply to manufacturer? Does it apply to the surgeon?
 5. Defences against Janet
 - Explain test for possible defences - Does this apply to manufacturer? Does it apply to the surgeon?

Some language features

The test for negligence

is

that a person has suffered damage as a result of a breach a duty of care
by another party or parties

Some language features

First, a duty of care

arises

where the defendant is in a position to reasonably foresee that

if he or she failed to take reasonable care

there is likelihood that he could
cause injury or damage to the
plaintiff

Some language features

One form of proximity

is

where a manufacturer owes a duty to the consumer to ensure that a product can be safely consumed (Grant v Aust Knitting Mills (1933) 50 CLR 387).

Comment

- Notice sentences start with something about the law not about people doing things.**
- Mapping the law onto the case is ‘being a legal expert’**

Student sample

Secondly Janet must show that the duty of care owed to her has been breached. This can be breached by a particular **act or omission**. The test for this is whether or not a reasonable likelihood that injury would occur as a result of the surgeon/**manufacturer's actions or omissions**. **Also in the case that** the person possesses particular skills (such as the surgeon) that person must have performed with the skill usually possessed by the person in that field. This means that the surgeon must have performed the surgery like a surgeon would have, this includes, not only performing the surgery, but also explaining all the risks of the surgery. Therefore the doctor has breached his duty of care to Janet by not explaining the risks of the surgery. The manufacturer has also breached their duty of care as the literature attesting to the safety of the implants was incorrect and did not fully explain the risks to the doctor and Janet.

Student sample

The surgeon who should of possessed particular skills breached a duty of care by not explaining to Janet the proper precautions and risks to having the surgery. So which in this case the surgeon was being negligent, because he failed to provide Janet with all the information and precautions to having the surgery. Which would make the test of breach of duty of care on whether the defendand could foresee that they would injure the plaintiff. In this case the surgeon may have not foreseen that the injury could occur by the must always be thinking about the risks that might happen. The manufacturer should also take more precautions to make sure that his goods do not become faulty.

Consequential activities

- Writing the discursive logic
 - Missing steps
- Writing dialogically
 - Handling defences
- Writing possible worlds
 - Entertaining possibilities

Missing steps

Example 1

The second element that must be present for the tort of negligence to be met is a breach of duty of care. In Donald and Marjories' case they must prove that the defendants' actions or failure to act resulted in a breach of duty of care.

Here the student
hasn't applied the test
to the case

Missing steps

Example 2

Fred and Ginger did breach their duty of care owed to Donald and Marjorie because there was a reasonable likelihood the elderly dancers would dance and wouldn't be able to see the sign given their eyesight was diminished.

Here the student has jumped from the principle to the detail of the case without including the test.

Handling 'Defences'

One kind of defence that may be used by the defendants is voluntary assumption of risk. This is where the plaintiff has voluntarily accepted that there is risk involved in a particular activity. The defendant must show that the plaintiff fully understood and accepted the risk of injury. The defence might argue that Janet's surgeon took all reasonable standards of care when performing his skills in performing the operation, that he relied on the statements made by the manufacturer attesting to the safety of the product, and that further inspection was not possible.

Entertaining possibilities

Example

One exception to the general rule of prior consistent statements is that a complaint made in sexual cases is admissible as a prior consistent statement if it is made at first opportunity. In this case, Victor claimed first that he had been mugged to the youths and then told the ambulance officers that he had been raped. The issue here is whether his statement about being raped to the ambulance officers could be taken to be at 'first opportunity' given he made a prior inconsistent statement to the youths. The court may decide that 'first opportunity' does not mean on the first occasion he spoke. If the court decides that then Victor's remark will be admissible in court. If the court decides that 'first opportunity' does mean first 'occasion' then the remark will be inadmissible.

Features of our approach

- Scaffolding students into the key identities/subject positions of powerful discourses
- By positing both the identities students bring to the target discourse and the target discourse it aspires to identify a developmental path between discourses and so develop stepped pedagogies to enable that development
- It depends on collaboration between language teachers and discipline teachers/lecturers

Features of our approach (cont)

- It identifies some linguistic affordances to enable students to integrate written texts with other practices that constitute the discourse and so create a language pedagogy that aligns with and serves students initiation into the discourse
- Finally, (and most tentatively) by laying out to students the constitutive means by which a discursive identity is formed through a pedagogy of forming that identity it aims to make that 'being in the world' open to further evaluation from the perspectives of other identities that students inhabit.

Some questions

- Will rhetorical and linguistic affordances suffice?
- Would SFL and Bernstein want to speak to this approach?

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