

## Rhetorical Reading In Law I: An Important Strategy For Meeting Essential Academic And Professional Skills Requirments

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### ABSTRACT

New law students often see law school as a foreign land with its own culture, literacy and language practices. How quickly and well students adjust to this new community reflects how they will perform in their first year of study. All students come with higher level reading skills. However, foundational law texts have a different content, form, language and syntax to texts previously studied. This paper posits that using rhetorical reading strategies as part of case method pedagogy in Law I helps students meet academic and professional learning outcomes. This is achieved by quick assimilation and into the legal culture. It also scaffolds learning, enabling students to integrate old and new knowledge and experiences and develop problem solving, critical thinking, and analysis and evaluation skills. In addition, it promotes metacognition by encouraging students to think about how they are learning.

### Keywords:

### INTRODUCTION

The first year law (L1) teaching and learning experience is more complex than simply learning the substantive law or skills content of courses. It is often the first step in the process by which students are acculturated into the legal community and sets the stage for their transformation from student to lawyer. The teaching and learning strategies used in the L1 classroom are crucial to academic success and building student confidence.

Most, if not all, L1 professors teaching substantive law courses on common law degrees in Canada use the case method of teaching. In case method, students learn an area of law through reading case law (i.e. the case reports or excerpts of cases) to find the underlying principles that will determine the outcome of the case and the subtle factual differences in related cases that influence the outcome. Case law, which is comprised of case reports, is the narrative produced by the client's story. This narrative is initiated by the client, reframed by counsel to best support their client's strongest legal arguments and then further refined by the judge(s) deciding the case (Law School Admission Council, 2013).

Unfortunately, many professors still provide students with prodigious reading lists and little guidance on how to read the cases or instructions on what they expect students to take from the case. Students are expected to come to class having completed their reading prepared to answer questions in front of the mass lecture class (Eisele, 1994). This is often a stressful and intimidating learning experience that reduces students' confidence. This paper posits that the challenges faced by L1's in the early days of law school are easily resolved when case method is taught using rhetorical reading strategies that require students to read cases by previewing, questioning, reading and reviewing the text. At the beginning of their legal study, students are often able to appropriately question the text themselves. Guided questions that accompany each week's reading scaffold learning and help students read with purpose.

Part I of this paper examines some the challenges facing new law school entrants. Part II sets out the academic and professional skills acquired by graduates of Windsor University's Law School. Part III demonstrates the significance of rhetorical reading strategies in helping L1's meet these learning outcomes.

### THE CHALLENGES OF LAW 1

To be a good lawyer you need to be able to read a variety of legal texts well. Upon entering law school, students join their upper year peers, professors, lawyers and judges in a new, arcane discourse community called "law," which has its own literacy and language practices. The speed with which students attain basic competency in this new discourse is a predictor of how well they will perform in their first year of legal study (Christensen, 2008). Anecdotal evidence suggests that students who are familiar with legal culture and equipped with rhetorical reading strategies are quicker to participate in and reach higher degrees of discourse competency because they are more able to discern from their reading what is important and what can be ignored.

Many new law students experience the same difficulties on entering law school as some new migrants: they are confronted with a new language, which for L1's is paradoxical being familiar and yet strange and a unique culture with its own norms and mores. The quickest road to assimilation is immersion, which typifies the L1 experience, where students are required to think, read, speak and write in their new language, with little or no prior preparation. To be able to do this well means much more than knowing or being able to recite a set of repeatable legal propositions. It is the ability to be fully oneself yet think, feel, communicate and act like a lawyer in multiple spheres of life. In short, to learn how the legal culture functions and become functionally adroit. White describes this: "as being able to speak truthfully to the conditions of the world and take positions (and offer them to others) which seem to you to be right. In doing all this you will subject your own views and inclinations to the discipline of the inherited culture and the conditions of the world" (1982, p. 3).

Reading is central to the transformation from student to lawyer. According to Weaver, (1991) done well, it produces the requisite knowledge of substantive law and the means of "thinking like a lawyer" (p. 518). This is an underlying tenet of Langdell's case method, which revolutionized American law teaching in 1870. This method is still widely used in varying degrees throughout North America. Case method is a form of self-directed learning where students read through case reports and work out for themselves what the dominant rules or principles are, how the judges' decision fits into the existing corpus of law and how it applies to their client's case. In essence, students are expected to review how the litigation developed and then extract four essential components from the case for future class discussion: (1) the material facts; (2) the issues(s) i.e. the legal question(s) to be answered; (3) how the court decided the case – the court's answer(s) and (4) the court's reasons for so deciding. Yet little time is set aside in the L1 curriculum for teaching students how to read a case well (Lundeberg, 1987; Christensen, 2006-7).

It is not surprising that for a twenty first century student in the first weeks of a North American law school reading morphs from a familiar, comfortable task to an incomprehensible one that is a strange, painful and disconcerting experience (Lundeberg, 1987, p.408; Christensen, 2008). A seemingly short case list takes on the appearance of an Olympic athlete's regimen and from the outset, many, if not all, L1's struggle to complete their assigned weekly readings and case briefings. By the onset of fall examinations some have fallen so far behind in their readings, that "catching up" seems impossible and they flounder or turn to online case summaries and canned notes.

Turow, in his book *L One*, described his first year at Harvard law school in the following way:

"In baseball it's the rookie year. In the navy it is boot camp. In many walks of life there is a similar time in trial and initiation, a period when newcomers are forced to be the victims of their own ineptness and when they must somehow master the basic skills of the profession in order to survive. For someone who wants to be a lawyer, that proving time is the first year of law school" (1977, p.9).

It is very easy for professors who read law cases with speed and ease, to forget how much longer it takes L1's to read and brief a case. Sullivan et al. (2007) citing Mertz's study (2007) of contract law students showed that it takes at least a full semester for students to "internalize the shift in understanding necessary to identify a legal point of view" (p. 53).

The nature of primary legal sources, either full case reports or selected excerpts from prescribed casebooks, acts, or

statutory instruments are simply very different in content, form, language and syntax to the texts students have previously engaged with. Anecdotal evidence suggests that even students with previous legal or law firm exposure find the weekly case briefings more difficult and time consuming than expected.

Fajans and Falk (1993) found that even the brightest and best students “too often scan judicial opinions for issue, holding and reasoning and call that ‘reading’” (p.163). This approach enables readers to move more quickly through their case “reading” but falls short of the reading required for academic excellence and professional success.

New readers initially find it difficult to separate legally significant facts from the irrelevant in their client’s case and distinguishing the ratio(s) in the judgment (the judge’s reasons for deciding the case as she did) they are reviewing from obiter observations (incidental observations). This is not surprising because case reports are traditionally dense, written by judges for a legal audience familiar with the law and contain legal terminology and sub-text inferences, which are not easily understood by new case readers. As Williams (2006) affirms, “[t]he finding of the ratio decidendi is not an automatic process; it calls for lawyerly skill and knowledge” (p.98).

Reading strategies that proved highly successful for undergraduate and postgraduate reading do not always work well in the beginning months of law school. For example, strong readers outside of law are often able to “read into” the text i.e. fill in comprehension gaps by resorting to “rules of thumb” drawn from the reader’s mental lexicon (Morris, 2003, p. 273). Being new to law students must rely on their existing knowledge which is not law specific and is of limited use because law requires precision of meaning. In case reading difficulties arise when L1’s understand the text in its ordinary English meaning, but particular words carry a specific legal meaning that goes beyond the English meaning (Lundeberg, 1987, p. 415). This is illustrated in the case of *Purcell v Taylor*, [1994] OJ no 2845. Here, counsel asked the appellate court in an action for damages for personal injury to interpret the meaning of ‘harbours’ in section 1 of the *Dog Owners Liability Act*, RSO 1990 (“DOLA”). In doing so, Borins J., referred to the meaning provided by the Shorter English Oxford English Dictionary, which describes “harbours” as: “to provide a lodging for; to shelter; to lodge, or entertain” (para. 15). This grammatical meaning is consistent with the legal meaning ascribed to the term by the American and English courts. However, Borins J., in rendering judgment held that “harbouring” for the purposes of sections 1 and 2(1) of the *DOLA* means more than the common English language meaning of “to offer shelter” to the dog and requires the person to exercise dominion, care and control of the dog (para. 30).

When faced with “foreign” legal terms, occasionally in Latin e.g. *mens rea* (“guilty mind”), the reader realizes that their word recognition skills, which have previously stood them in good stead, are now deficient. Added to this, is the challenge of determining whether the words used are literal or legal. As Mellinkoff (1963) states, new readers have little or no previous knowledge to help them establish whether they are reading English language words or “words peculiar to law (p. 437). Lundberg, (1987) found that students tended “to blame themselves not the text” for their reading difficulties (p. 665). This still holds true today.

The organic and dynamic nature of common law is also confusing to new readers. Readers find the same rule or word applied or interpreted differently by different courts at different times. This is the natural process by which common law develops, either through the creation of new principles or rules or through reinterpreting, revising and elaborating existing law precedent by precedent. For example, Sharpe J writing for the Ontario Court of Appeal in *Jones v Tsige*, 2012 ONCA 32 confirmed the existence of a new tort of intrusion upon seclusion. He described this new right of action as an “incremental step” to develop the common law “in a manner consistent with the changing needs of society” (para. 65).

Another difficulty is case structure (Lundeberg, 1987 p.413). As Dewitz (1995-6) states, “case structure is unique” (p. 658). It is framed differently from standard reports such as business, history, science or policy reports, which are commonly encountered in undergraduate study. Case reports are usually structured with headings and sub-headings and are comprised of the following components: a brief synopsis of the case, the procedural history, if relevant, a facts section, a statement of the issues to be addressed by the court, the legal reasoning for each issue and the disposition. Old seminal cases, like *Carlill v Carbolic Smoke Ball Co* [1892] EWCA Civ 1, or *Donoghue v Stevenson* [1932] UKHL100, are more problematic to L1’s because many originate in England and have a slightly different structure. They are often written as unbroken text without headings or sub-headings for guidance. Also, society, artifacts, culture, and literal and legal language meaning has changed over time which can cause confusion. As Martin Davies (2003) reminds us, an old judgment is a reported experience not a lived experience. Hence it is natural for L1’s to reframe old cases by reading into them current legal, social, economic and political understanding.

Students also tend to overlook the fact that, rather like a book, case headings and sub-heading provide the reader with a map of the case (Dewitz, 1997). Until students become familiar with case structure they read linearly from start to finish because it is difficult for them to move backwards and forwards in the text with ease.

Also, if L1’s are simply provided with a case list with no guidance or focus for the reading, they are more likely to become lost or frustrated in the reading process and be unsure of whether the points they have drawn from the case are correct. Hence some students prefer to read post lecture rather than pre lecture.

The combination of a weak knowledge base, unfamiliar text structure and some L1's initial inability to move beyond linear reading means they spend a great deal of time and effort performing the simplest type of case brief. This leaves students unwilling or unable (due to time constraints and work pressure) to delve deeper into the cases to search for inconsistencies, points of analogy and distinction or consider why the judgment might be wrong.

### ACADEMIC AND PROFESSION SKILLS COMPETENCIES

Unlike the United States, Canada's common law school graduates were not held to a national standard of competence for professional licensing admission until 2010. In 2010, Canada's law societies agreed on a uniform national requirement for common law graduates effective from 2015. The national requirement specifies the competencies and skills graduates must possess, as well as directives for law school program content and resources. As a result, in 2015 law Deans in common law provinces must demonstrate how their J.D. programs equip students with the mandated competencies required for Bar admission. Competencies include *inter alia*: problem-solving, legal research, statutory interpretation, communication, professional and ethical competency and specified knowledge.

Rhetorical reading addresses *Problem-solving* which includes the ability to: identify relevant facts; identify and evaluate the appropriateness of alternatives for resolution of the issue or dispute; analyze research results; apply the law to the facts of a client's case and identify and evaluate the appropriateness of alternatives for resolution of the issue or dispute. *Legal research*, which includes the ability to: identify legal issues; .... use techniques of legal reasoning and argument i.e. case analysis and statutory interpretation to analyze legal issues; identify, interpret and apply the research results and effectively communicate the research results. *Communication* includes the ability to communicate clearly in the English or French language; identify the purpose of the proposed communication; use correct grammar, spelling and language suitable to the purpose of the communication and for its intended audience; and effectively formulate and present well reasoned and accurate legal argument, analysis, advice and submissions.

These competencies and others are reflected in the learning outcomes for the University of Windsor law school.

Elizabeth Mertz (as cited in Sullivan et al., 2007), aptly described the sum of these competencies as the ability to:

"[T]ranslate messy situations into the clarity and precision of legal procedure and doctrine and then to take strategic action through legal argument in order to advance a client's cause before a court or in negotiation" (p. 54).

This ability demonstrates how well graduates can think and act like in-firm lawyers who bring to their everyday tasks "professional, careful, critical thinking" (Morris, 2003, p.268) and can think rhetorically within a problem solving context" (Saunders & Levine, 1994, p.125). This is more easily achieved by those who have been acculturated into the legal community and have a strong grasp of legal language. Morris (2003) concretely describes how rhetorical legal discourse is predicated on understanding the language, conventions and practices of the legal community and how they apply in the multifarious contexts of professional practice.

Rhetorical reading strategies quicken acculturation and are a useful tool for developing and honing rhetorical thinking because they push students out of default strategies such as highlighting or verbatim quoting (Dewitz 1995-6), towards resolving points of confusion when they arise, questioning the text and making predictions. This opens the way for students to see connections between concepts, principles, rules and ideas. L1's first exposure to rhetorical thinking of this kind is found in the judicial reasoning of case reports, which is premised on the rhetorical thinking of counsel in their selection of sources and their skillful manipulation of law to facts when crafting their arguments. In addition, appellate case reports often reveals how judges reframe the issue(s) put forward by counsel, tailoring them to their own reasoning and subsequent disposition of the case.

### SIGNIFICANCE OF RHETORICAL READING

Robinson (1961) described the steps of rhetorical reading as preview, question, read and review (PQRR). The results of Christensen's study (2008) suggests that law L1's should be advised to: "(1) read with purpose, (2) use background knowledge to situate the case, (3) establish the context of the case before beginning to read, (4) evaluate the case and have an opinion about its outcome and (5) read flexibly; skim and skip when appropriate" (p. 53).

For new case readers, it is essential that professors bring the case into focus for the reader. This is easily accomplished by asking the reader to begin with a quick skim reading that previews the case and requires them to identify the people, place and

events in terms of: who, what, where, when, how and why of the case. This enables readers to place the case in context. The next step is to ask students to consider the historical, social, political, cultural and moral context of the case, before moving on to the legal issues, concepts and disposition. Having answered these questions the reader has a sense of the case and is better able to formulate their own questions that they want answered by the text. As students become more familiar with rhetorical reading their questions will change and become more elaborate as their conceptual knowledge expands and their reading skill increases.

A quick and easy way to introduce case structure to L1's is to ask students to read a case for the purpose of creating a "roadmap" of the case from the judge's headings and sub-heading. The roadmap should include: the style of cause, citation, procedural history of the case, an issue(s) statement (legal issue before court, a ratio for each issue (legal answer) and the disposition. By working with the structure of a case to produce a mapped overview of the case students see at once how knowing case structure can help them read case law more efficiently and effectively.

Some of the benefits of rhetorical reading are that it helps students attain higher order reading skills by: problem solving, fostering critical reading skills and language cognition, discouraging linear reading, allowing readers to consider a case from its historical context as a pinpoint in time and then reframe it for the present. All of these facilitate legal skills learning (Dewitz, 1995-6; Lundeberg, 1987; Christensen, 2006-7; Christensen, 2008).

### **Fosters Critical Reading Skills and Language Cognition**

Rhetorical reading is a strategy that enables new legal readers to read a case report for its full worth. In other words readers learn to comprehend complex legal material and identify the legal terminology necessary to summarize, analyze, and convey the meaning of the text concisely with precision and logic. Rhetorical reading is especially helpful to new case readers who are reading for content knowledge and understanding but at the beginning of their legal studies find it difficult, through lack of legal knowledge, to create their own directional reading questions (Dewitz, 1995-6; Lundeberg 1987; Christensen, 2008) As students become more familiar with guided case reading for specific purposes and in particular contexts they are able to spot recurring language patterns, which over time become embedded in their everyday language. In addition, language recognition and meaning make it possible for students to become adept in defining legal problems, identifying legally significant facts and then analogizing and distinguishing these facts from those in a client's case.

### **Discourages Linear Reading**

Lundberg (1987) found that expert readers looked at headings and other indicators of text content before reading the text in depth, so as to mentally orientate themselves to what they were about to read. This places them in a better position than novices to take in what they read because they can move backwards and forwards in the judgment with ease.

A common rhetorical reading strategy is to ask new readers to read in role. In doing so, readers learn how to find and follow a specific line of reasoning. When a reader is asked to find and determine the reasoning of the appellant, opposing counsel or a dissenting or concurring judge, the reader has a clear focus and purpose for reading. Consequently, they actively look for and note the directional guides in the text that help them to find the information that they are reading for rather than skimming over them. This technique increases the reader's familiarity with case structure. Once readers are familiar with the structure and layout of case reports, they are able to navigate through a lengthy case text by moving between different blocks of text. For example, the reader who knows case structure can jump from the facts to the disposition or from one point of analysis back to the facts, then forward to the next point of analysis. This is a high level reading skill prevalent in proficient legal readers (Christensen, 2008). Increased reading efficiency reduces the amount of time and effort the reader expends on extracting the relevant information from the case and frees up time for critical thought.

### **Encourages Textual Reframing**

Case reports are different from other reports in many aspects, particularly the interchange of narrative text and expository text. Narrative text reads like a story and records the history, facts of the case and the disposition, while expository text relays the judge's legal reasoning and analysis.

Once new readers become accustomed to reading rhetorically they can ask their own questions of the text. A common starting point is to take the expository text headings and sub-headings and reframe them as questions to be answered by deconstructing the text and predictive analysis. The critical search for answers from within the text produces a richer understanding and knowledge of the case. Readers discern connections to their prior knowledge and experience and consider how they might fit with their new knowledge gleaned from the text (Bernadowski & Kolencik, 2010). This engages critical



thinking and problem solving to identify legal doctrine, rules and principles from legislation or case law, synthesis and analysis of law, and evaluation of past and present legal knowledge to construct a deeper meaning that incorporates or rejects new knowledge drawn from the case. This experience moves the reader beyond what the text says to what it means in substance and in practice. This forces the reader to decide what elements of the case are important and how the legal reasoning of the case addresses the questions they have raised.

### **Promotes Thoughtful Categorization of Legal Knowledge and Process Knowledge**

Professors advocating rhetorical reading also instruct students to find themes, assumptions, missing information and underlying policy in the case text. When weekly rhetorical reading is married to Socratic questioning and in-class problem solving exercises, the instructor is able to check what L1's have learned from their readings and how well they have learned. Class dialogue and student answers to the in-class problem demonstrate whether students were able to: read and process the case appropriately, analyze and apply the case correctly to a novel problem and situate the case within its appropriate time frame and the topic being studied. The professor can step in when learning errors are found or gaps are highlighted. The professor's role is to correct the errors and explicitly state what the missing connections are, where to find them in the text, how they relate to prior material studied in class, why they are important and provide examples of how the new information fits with prior learning. This clarifies and consolidates the students' understanding of the law and enables the class to check that their categorization of what has been read into blocks of content and process knowledge is correct. By modelling how to think about organizing and integrating new knowledge gleaned from case reading and its application to future cases, the professor models how to think like a lawyer. This also re-emphasises to students the professional importance of high level legal reading skills.

### **Keeping it Real**

When L1's are simply asked to complete a list of case readings without further instructions, the parties and circumstances of the case take on the character of abstract puzzle pieces that band together to make the legal argument. As Mertz (cited in Sullivan et al., 2007 p. 54) states, this creates a relational distance and removes bias, which is not always a good thing. In removing bias caused by the parties' social class, education or socially unacceptable or egregious actions, issues of unfairness relating to these matters also becomes distanced. Rhetorical readers instructed to objectively consider the political, social and economic contexts of the case and how this impacts the parties cannot "distance themselves beyond the point of objectivity." This makes it possible for the reader to keep the narrative and expository text in its proper time frame i.e. when the case was tried (Davies, 1987). This is important because similar fact cases from different time periods involving social issues illustrate how the law, societal norms, values and social and economic policy have matured, developed or adapted, often in an effort to resolve unfairness. It also highlights instances where unfairness or injustice remains unresolved.

### **Helps Students Acquire Skills Competency**

Lawyers read rhetorically as a matter of course in their day to day practice (Christensen, 2008). Hence this strategy is instrumental in developing the core skills for LSUC competency: problem-solving, critical thinking, analyzing and synthesizing the law to the point where the distilled law can be applied to novel client problems to create elegant solutions that are clearly and concisely communicated.

### **Active Problem Solving**

Rhetorical readers question the text and problem-solve as they move through the text resolving points of confusion in the facts or legal reasoning as they arise. Deegan found that new readers who question and hypothesized as they progressed through the text and sought out external sources to help them resolve points of confusion were more likely to be high achievers at the end of Law I (1995, p.160). This is not surprising since this type of problem solving is what lawyers do every day and calls for critical, analytical and creative thinking. Deegan (1995), like Spiro (1980), found that less successful readers were those who found the text difficult to understand, did not question or engage the text, skipped over points of confusion and resorted to passive "default strategies" akin to cataloguing (cited in Deegan, 1995 p.161).

Contextualizing is a core component of rhetorical reading and is instrumental in problem solving. Rhetorical method stresses the importance of student exposure to fuller accounts of cases rather than casebook excerpts, so students become familiar with the idea that facts are used differently by the parties to emphasize their side of the case (Mertz cited in Sullivan, 2007).

L1's initially fall into the trap of considering cases individually because all cases turn on their own unique set of facts. This

temptation should be avoided because common law courts never consider the case at bar in a vacuum, isolated from the history and the development of the jurisprudence that preceded it. As Edmund Burke remarked, “laws like houses lean on one another” and each fresh legal action in Canada grows out of others that preceded it. While this creates certainty in the law, there is no guarantee that a later case with substantially similar facts will not be decided differently because the later court finds grounds to distinguish it.

Reading a case report is a limited one dimensional view of how a particular court applied the law at a given point in time to a specific set of facts resulting in a particular outcome. If the reader only views the law through the prism of the final appellate decision they are left with a blind spot seeing only the final part of a much larger picture. Readers are likely to gain a clearer and fuller understanding of the legal arguments if they trace legal arguments back to their point of origin. Then, readers can see for themselves how the facts and legal arguments of the case are changed by the legal process as it makes its way through the courts to the point of final resolution.

Context is also a central component of factual analysis. Students learn that a difficult fact narrative in an appeal case can often be mastered by returning to the trial judgment. At trial, the facts of the case are comprehensively reviewed and determined. The import of which, is often lost in the redacted facts stated on appeal.

### **Critical Thinking**

Purposeful questioning, which is the hallmark of rhetorical reading, promotes critical, reflective thinking. Questions are usually framed as “what if” questions addressing how the case might be decided if certain facts had been present or omitted. This allows L1’s the opportunity to extrapolate the findings in the case by considering whether or not the new facts create a new legal problem and if so, reframe the issue and apply the same rules and reasoning to predict the probable disposition of the new case. This type of problem solving requires an accurate understanding of the pith and substance of the law, how the law applies to the facts of the case, why the judges decided the case in the way that they did and the readers’ evaluation of the quality of the original judgment. Purposeful questioning of this sort helps L1’s to form and use their observations and opinion of the case to resolve the new legal problem.

L1’s substantive legal knowledge and the skills developed through rhetorical reading strategies are further consolidated when students are asked to apply their knowledge to create a “diagram of action” or write a case summary (Oates 1997, p.30). Both tasks should set out: the cause of action by answering the: who, what, where, when, how and why questions of the trial action and then moves on to consider who appealed and on what grounds, the disposition of the appeal and why the court rendered judgment as it did. These simple exercises can be completed in or outside of class and can be peer or self assessed by model answers. As Oates states, to chart the progress of a case in this way requires retention of the key points drawn from the text, clarity of thinking, comprehension, legal analysis and integration of new legal knowledge with existing knowledge (1997, p.30).

### **Factual Analysis**

Facts can be a stumbling block to students. Law school is all about “law” and L1’s are keen to gather as much legal knowledge as they can, as quickly as they can. However, the quest to find and apply the relevant law often overshadows the facts of the legal issue(s) to be resolved. It takes L1’s a while to grasp that a judicial decision is tied to the specific facts of the case and the judge’s reasoning cannot be meaningfully discussed outside of the facts that created it.

Determining which facts are significant looks deceptively easy. However, when L1’s are asked to trace the procedural history of a case they are alerted to the way in which factual significance is open to change on appeal as the legal issue(s) are modified or elaborated (Mertz cited in Sullivan et al., 2007). This draws L1’s attention to the way in which facts are simultaneously fixed and malleable. Facts are fixed, in so much as they are verifiable or the witness has been found credible at trial and malleable in their use by counsel to forge equally valid but opposing legal arguments. Through this exposure, students soon realize that the term “facts” has a specific meaning in the common law context, is qualified by the term “material” and refers to only those facts which precedent decrees support the parties’ claims. As Mertz states, legally significant facts are revealed through “complex processes of interpretation that are shaped by pressures of litigation” (2007, p.53). The contextual reframing offered by rhetorical reading provides learning scaffolding that gives L1’s the confidence to grapple with these interpretations rather than running from them.

### **Statutory Interpretation**

An important step in legal analysis is to review cases that explain and interpret the applicable legislative authority. When reviewing cases, students must be mindful to only draw from those cases that speak directly to the current wording of the provision under review and not an interpretation of an outdated, amended or repealed version of the provision.

Purposeful questioning is a good technique for alerting L1's to the fact that sometimes the meaning of legally significant words in a legislative provision may not be provided within the Act, in which case it is necessary to see how the courts have interpreted it. This is illustrated in *Purcell v Taylor* [1992] OJ no 2554, above. The court was asked to consider whether homeowners, who were away at the time, incurred liability as dog owners for "harbouring" the dogs of an unannounced guest residing at their home for the purposes of section 1 of the *Dog Owners Liability Act*. At first instance, Justice Blair applied the ordinary meaning of harbours, i.e. "to shelter or provide lodging" concluding that the legislature did not intend for homeowners in these circumstances to become "owners" under the *DOLA*. On appeal, justices Hartt, Campbell and Dunnet found that the trial judge erred in too narrowly interpreting the word harbours. The homeowners had provided a dog run or dog house for the dogs on at least twelve occasions. This was sufficient to establish harbouring on a temporary basis ([1993] OJ no 1935 at paras 5-6). In a further action for personal injury, Justice Borins held that the *DOLA* does not apply where a guest is allowed to bring his or her dog into the home of a host ([1994] OJ no 2845 at paras 30-34).

Purposeful questions for the reading of *Purcell v Taylor*, might ask L1's to consider how the court interpreted the word "harbours" in section 1 of the *DOLA* and whether that interpretation could be distinguished if the defendant was a pet friendly hotel?

### Legal Analysis and Synthesis

As L1's become practiced in rhetorical reading their perception of legal analysis broadens. They begin to see legal analysis and synthesis in a new light i.e. not as a static, rigid process but "a dynamic iterative process" that calls for creativity and flexibility in the blending and redaction of similar fact and issue cases to a common thread germane to all. Smith refers to this as the "structured manipulation of information" (1998, p. 2).

Readers who can identify themes and patterns are able to concretely synthesis the law, create lines of argument and rebuttal and make predictions. At this point in learning, readers know that points of confusion are glossed over at the reader's peril. Every time the reader resolves a point of confusion their mental lexicon expands, deepening and extending the connections they can make. This lies at the heart of case synthesis and inductive reasoning where numerous cases can be blended together on the basis of legally significant factual similarities or differences and then parsed down to a controlling authority statement that is germane to all and extrapolated to the problem at hand. The result is a strong, cohesive legal argument that is organized around a controlling authority rather than a weaker argument comprising a myriad of overlapping cases.

### Communication

Students learn that through reading cases at a deeper level of comprehension they are able to understand and "talk about human conflicts in a distinctly legal voice" (Mertz, as cited in Sullivan et al., 2007, p.53). Rhetorical reading socializes students into the legal language culture enabling them to communicate effectively within the legal community. However, it does not readily lend itself to the task of simplifying complex language. This said, without an accurate understanding of the substantive law and language of the case which rhetorical reading provides, it is very difficult to reduce the case to plain English that can be understood by the lay client.

### Metacognition

Metacognition occurs when students are aware of their cognitive processes and are able to reflect on how they learned as well as what they learned. This is often referred to as "thinking about thinking." Metacognition is a key step towards becoming a reflective practitioner (Schön 1983). Reflection, like any skill needs to be learned and practiced. Reflection is fostered when professors set reading tasks requiring students to read in role (counsel for the claimant or defendant, or judge) and then note how they read the case to find: the legal reasoning for their role, the rules and principles that govern the case and points of analogy and distinction within the legal arguments. By reflecting on the reading process, students become aware of themselves as legal readers and can consider what they might do differently next time to improve the efficiency and effectiveness of their reading.

When students are asked to orally present their finding from reading in role, it gives L1's the chance to hear the case from different perspectives and an opportunity to practice communicating complex ideas simply and concisely in plain English. It also enables the professor to check and correct errors in understanding and extend the dialogue to involve the class.

Another reflective technique that offers an alternative to journaling is the "letter to a friend" exercise. For this exercise, students are asked to write a letter to a hypothetical friend (Biggs & Tang, 2007). In the letter, students explain to their friend how they read the case, hindrances they encountered, how they overcame them, what went well and what did not and any changes they are considering making to their case reading process.



## CONCLUSIONS

Rhetorical reading strategies equip L1's with the language cognition needed to acculturate more quickly into the legal community. They also foster a deeper understanding of the substantive law while developing the academic and professional skills needed for academic success and admission to the Canadian Bar.

Linear, one dimensional case reading is as different from rhetorical reading as looking at a picture of an object in a book and seeing the object itself. In the words of the famous French artist Robert Delaunay, "our understanding is correlative to our perception." Like a picture, one dimensional reading offers a limited means of understanding the true nature and qualities of the case. Rhetorical reading on the other hand allows the reader to comprehend complex and lengthy case test and identify the legal terminology necessary to summarize, analyze, and convey the meaning of the case precisely and with clarity and precision.

For rhetorical reading strategies to be successfully combined with case method and yield the greatest benefits to L1 students, professors must ensure that students know why they are reading the case, what they are to look for in the case, why they are looking for it, what they are expected to learn from their reading and how and why they expected to organize the information taken from the case text in a particular way. Otherwise when L1's are presented with a case list and little, or no instructional guidance or feedback, case reading becomes an obligatory chore from which many procrastinate and then end up relying heavily on canned notes.

Without timely feedback through in-class activities, many who diligently case brief are left wondering whether what they have done is good enough and uncertain if the rules and ratios identified are correct. This is easily mitigated when professors take the time to clarify terms, explain new terminology and concepts and show the relationship between concepts in a diagram in advance of reading, provide questions to be answered from the reading or assign reading in role tasks.

Rhetorical readers are patient and willing to engage fully with the text until they understand what are reading. They are willing to thrash out the meaning of complex sentences or paragraphs they find difficult to comprehend by asking questions and consulting secondary sources such as legal dictionaries, textbooks, annotated acts and monographs. Rhetorical readers do not exchange highlighting what they perceive to be important for engaging and questioning the text. Instead, both strategies are used.

Conversely, for students who are not practiced in rhetorical reading and read linearly, highlighting information is the central focus of case reading. They are so involved in highlighting large chunks of text they have difficulty understanding or remembering what they have read. Points of confusion or incomprehension become stumbling blocks that either halt reading or are glossed over. This makes it more difficult for students to retain what they have read because their thinking and analysis is unclear. Therefore, trying to integrate new and existing knowledge becomes problematic for them. When errors are corrected and points of confusion resolved in class those who have not learned to engage with the case text through rhetorical reading are more likely to simply to record what the professor has said and leave it at that.

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