

CHAPTER ONE

AN OVERVIEW

1.0 INTRODUCTION

This study of genre analysis is based on the introductory chapters from several books on the Law of Tort. The researcher is looking at the structural patterns of the introduction chapters and identifying the main elements that constitute the law of Tort and anatomise into components that embodies the main issues. Therefore in Tort introductions one may presume that these legal writers will introduce and open the pathway to this legal genre by describing albeit briefly and simplistically the core elements such as the 3 principles of the law of Tort i.e. the duty of care, breach of duty and damages, the types of liability, defences, limitations, remedies and death.

1.1 PURPOSE STATEMENT

The purpose of this qualitative study is to explore the legal genre and identify a structural pattern in the text by applying legal reasoning moves and steps on the Introduction chapter of the Law of TORT from various Tort textbooks, 5 texts in particular. The study is aimed at how a legal text are organised and why they are organized in such a manner. The study of genre is associated with text analysis to determine the organisation of text from the perspective of information, rhetoric, and stylistics.

However, it is inaccurate to say that it is through textual analysis that one is able to rationalise on how genre text has certain features.

1.2 BACKGROUND TO THE STUDY

Legal knowledge and legal genres

Gibbons (2001) in his book entitled Language and the Law and Wallace and Weaver (1988) explain that for the purposes of applied linguistics, one must have a sound knowledge and understanding of the legal language. Therefore one must be able to identify parts i.e. introduction, description of the chapters, contents and conclusion of

the text according to the law of Tort. The essence of Tort law is about the rules peculiar to the law of Tort and that the facts provided at this juncture would suffice for effective storytelling.

Legal genres have their own style, stance and substance. Accessibility of legal discourse is determined by components and readability, interpretation and application to the real life facts of life. Syntactic complexity and density of information is inaccessible to lay people or intended audience. Therefore the regular use of discursal forms creates solidarity within its membership whilst negating or widening the social gap with the outsiders.

1.2.1 Legislations, Legal cases and Legal Textbooks

Law depends centrally on conventional standardised disciplinary genre ie legislations and judgements to achieve its disciplinary goals. There is intertextual and interdiscursive patterning that these mutually dependant generic constructs display in all forms of legal discourse.

1.2.2 The Participants

a) Who are the **writers (producers)**?

They are the parliamentary draftsmen who are qualified lawyers, trained by their peers in adopting similar rhetorical way of writing. These legal draftsmen do not as a rule participate in parliamentary discussions, i.e. there are only writers of the document and not the actual author of legislation.

b) Who are the **readers**?

Once these legislations are enforced, they are provisions meant for lay persons (ordinary citizens) as these legislators enact statutory provision based on regulating and preserving order in a society. However, the real readers are lawyers and judges who are responsible for the interpretation to the lay people.

The law is intended for each individual in the society, but it is interpreted by the specialists. Its illocutionary force holds regardless of the participants in the

communication. The main function of statutes is directive –which imposes obligations and confers rights to individuals.

1.2.3 The Communicative purpose

The main concern in legal drafting is the expression of the intent of the legislative body, and not on the facilitation of text comprehension and the ultimate concern of statutes is to regulate behaviour and not so much in informing and imparting knowledge. Its communicative purpose is to govern, maintain order in individuals and institutions by having rules and regulations entrenched in statutes.

1.2.4 Production Strategies

a) In other types of text, the author often expresses an idea and then reformulates it in a different way so as to give the reader sufficient means and time to digest it. In legislations however, sentences are over-compacted and arranged in lists: the interpreter has the task to determine which ideas are important.

b) The draftsman always has to keep in mind that he is writing for a hostile audience - his text will be interpreted by warring sides in the courtroom.

Power to legislate rests with the legislature and it is entrusted with the arduous task to enact laws and legislations that encompasses all possible eventualities in the sense of being all inclusive, clauses being clear and precise, detailed comprising of all elements in a single sentence and disambiguated. Thus this ultimately led to the question ' who are the readers?' Bhatia (1993:102) says statutory writing strives to be precise and at the same time all-inclusive.

1.2.5 Legal Textbooks

The main objective of legal textbooks is to encourage legal reasoning, to think as a legal practitioner, to understand and reflect on the nature of law, its functions and applications and use tried and tested modes of communication and pursue legal issues through research. Legal textbook materials in terms of instructional strategies is structured to negate any misunderstanding that may arise. Therefore, the structure of a legal text that is highly formulaic or stereotypical is the most salient feature to encourage wider

readership.

1.2.6 Mental Schemata

By the same token, Bartlett expounded the concept of schemata in 1932 whereby he explained how information is rearranged and reinterpreted by material designers (legal authors) to match their anticipated readers' schemata with their expert legal knowledge of a particular legal structures, here in this instance the knowledge on the law of Tort on Negligence. Accordingly, Tannen and Wallat (1999:356) said that the community of practise will collaborate to negotiate the interaction till the objectives are met.

1.2.7 Intertextuality and Interdiscursivity

According to Candlin and Maley (1997)_there is high degree of **intertextuality** and **interdiscursivity** in the **legal genre**. Intertextuality merely means plurality of text source. A prior text transform from the PAST into the PRESENT whereas interdiscursivity is more innovative to create hybrid or novel constructs by appropriating conventions and resources with other genre and practices.

Rhetorical strategies are deeply rooted in the course of law with its main distinctive characteristic of unique intertextual and interdiscursive quality. Emphasis is placed on the principles of law from material facts of the cases and application of legal principles.

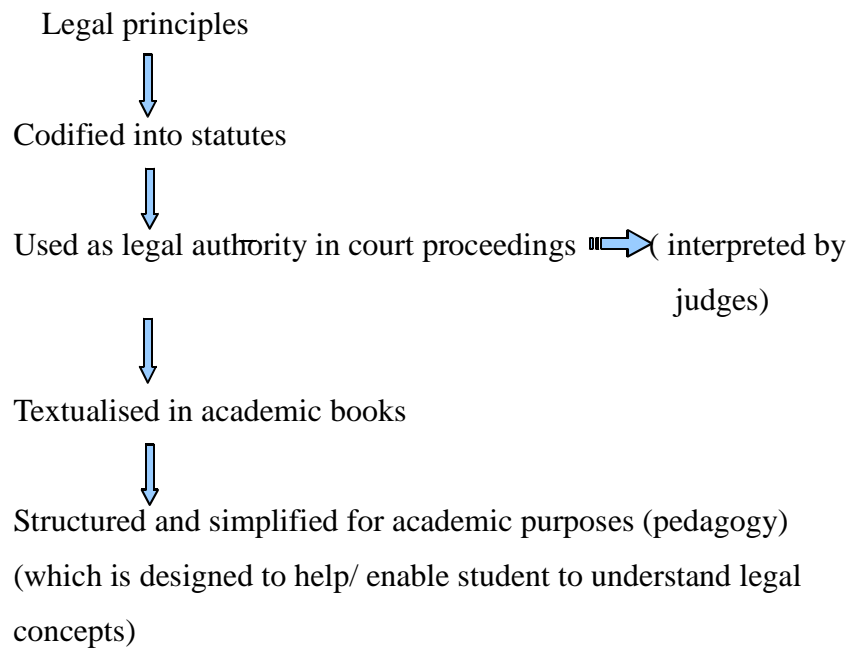


Figure 1.1 : Interdiscursivity can be exemplified by the researcher as above

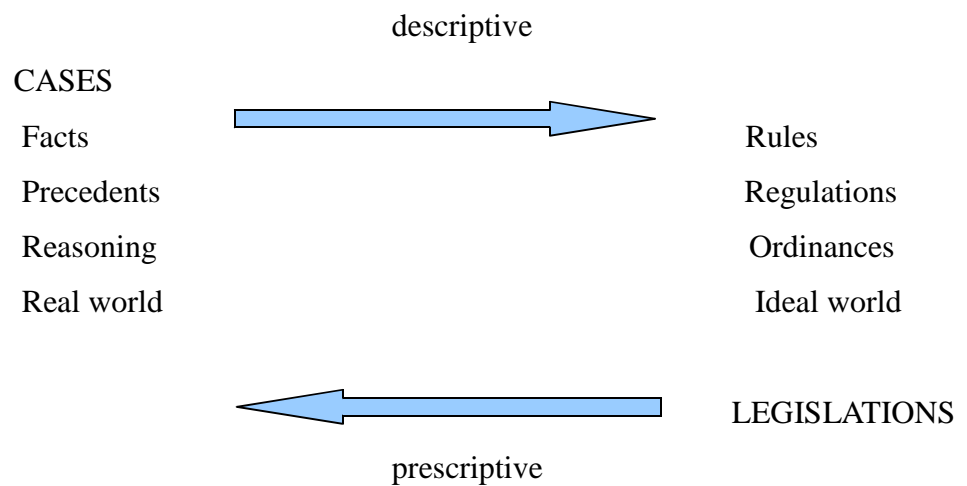


Figure 1.2 : Above is a representation figure from Bhatia (2004:51) of a dialectical relationship between caselaws and legislations

Intertextual	Interdiscursive
-Past legal judgments	-judicial interpretation
- legislative provisions	-doctrine of stare decisis
- legal interpretation	-reconstruct legitimate legal interpretation of case.
- annotations	-legal arguments

Figure 1.3 : An example of intertextuality and interdiscursivity

1.2.8 Law of Tort

What is Tort? Tort means a wrong. The law of Tort is concerned with the determination of disputes which arise where one person alleges wrong conduct against another. Every tort writers propose to expose a reader to what the law of tort is which is a civil wrong that gives rise to a civil proceeding to enforce a right but it also extends to imprisonment of persons for crime committed. In other words, tort can be a criminal wrong as well.

Basically, the law of Tort is concerned with the legal duties that an individual owes to another and the rights that the law will protect. Simply put, in the law of Tort, what is important are the grounds available to claimants (victims of tortious acts) to seek compensation or redress.

The law of tort is focused on the financial or physical injury to persons and chattels and providing recourse to restore and compensate the person deprived of such propriety or physical harm inflicted upon them. Tort also act as a deterrence to people from harming another and one may realise later that the essence of the law of tort will serve as a conduit for apportioning a plaintiff's or a claimant's loss over the community as opposed to plaintiff having to bear entire loss. One may only be able to spread the loss by analysing the chain of events which culminated to the loss.

On the introduction chapter of the tort law, one is able to identify the typical generic structure from tort authors regardless of how they structured the introduction of the fundamental principles of tort.

1.3 RESEARCH QUESTIONS

RQ1: What are the communicative purposes that shaped the introduction?

RQ2: Are there common linguistic features that indicate the existence of a genre in Tort introductions?

RQ3: What are the communicative stages of these 5 introduction chapters of the law of Tort?

RQ4: What are the difficulties raised by the writers of Tort textbook?

1.4 SIGNIFICANCE OF THE STUDY

The intention of this research is aimed at understanding how these 5 legal writers draft their introductory chapters. There are no fixity of features introduced in order of priority. The disparity in choices of legal issues, some legal writers situate the introduction of certain legal doctrines at the initial stage of text, whilst others will raise similar issues towards the end of the introduction chapter. This imbalance or disparity of the contents observed from these 5 texts has piqued the researcher's curiosity and interest to delve further to research on how these academic legal writers draft their introduction chapters by applying Bhatia's move-analytical procedure on every fragment of the text in the hope that the decontextualization will establish an appropriate answer.

1.5 ESP and LEGAL GENRE

ESP focus on English not as a subject separated from a student's real world but rather it is integrated into a subject matter area important to the learners. Typical legal genre is used in ESP class. Genre analysis in the professional contexts i.e. in the legal capacity are fundamentally different where highly specialised vocabulary is used. Therefore, the specialist discourse community must be familiar with the knowledge of the code for developing communicative expertise in special discourse.

1.5.1 EALP (English for Academic and Legal Purposes)

An account of ESP, EALP is necessary for this research as some of the approaches will be applied at a later stage. Since the vocabulary of the law is highly specialised, specialist community must be able to differentiate the language of everyday and in the technical sense in the legal domain. Legal terminology is often ancient in derivation. It carries the very fingerprints of English history.

Many Latin terms were used in legal vocabulary. These are some maxims found in the law of Tort.

For example :

"res ipsa loquitur"---- which means *'the thing speaks for itself'* It is a rule of evidence

in actions for injury where the mere fact of an accident occurring raises the inference of the defendant's negligence so that a prima facie case exists. Example from a caselaw which upheld this maxim as *Ward v Tesco Ltd (1976) 1 WLR 810* whereby the issue here was victim slipped on a supermarket floor. Hence, the 'thing' or 'res ipsa' here is the wet floor and that fact would suffice to lay a claim for negligence on the part of the TESCO supermarket. Interestingly, this maxim is not only relevant as an entrenched rule of law in the law of Tort but it is also relevant in scientific description of natural reality as well.

*"volenti non fit injuria---*which means *'no injury can be done to a willing person.'* Again, this Latin maxim is exemplified in the case of *Nettleship v Weston (1971) 3 WLR 370* Court of Appeal where the court upheld that the standard of care of expected of a learner driver is the same standard as a competent driver.

Further, Caton (1963) and Schauer (1987) from two different disciplines or community of practice had the *consensus ad idem* that legal language is in fact a technical language. In the words of Caton (1963) a linguistic philosopher, he was of the opinion that [the nature of legal language is a technical language and technical language is an adjunct of ordinary language. (Caton 1963:8)]. By the same token, Schauer (1987: 571) a legal philosopher contended that legal language is a technical language which operates in the context that makes legal terms have different meanings from non legal context. Therefore, Schauer claims that legal language is parasitic of ordinary language and that it is *sui generis* i.e unique unto itself.

The researcher highlight some legal phrases which may be difficult for a layperson to understand where ordinarily the words mean something else. These are some of the words found in the law of Tort.

"private nuisance"--as opposed to public nuisance, private nuisance is defined as 'unreasonable discomfort to another person'.

"fair comment"-----simply means comments that are based on **true facts** are deemed to be fair comment.

"consideration"----- is defined by L.B. Curzon in A dictionary of Law as "some right,

interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other".

There are also terms such as 'good consideration' and bad consideration' in law. These virtue of consideration is crucial element to conclude a contract in that for a contract to be enforceable, there has to be 3 core elements i.e :

- a) An offer made.
- b) A consideration given.
- c) An acceptance of the offer.

Bruce (2002) provides a functional approach to analyse (a communicative genre) i.e. case reports by adopting the functional sequence of legal reasoning moves and steps.

LEGAL GENRE	LEGAL CONTENTS	LEGAL REASONING "MOVES"	LEGAL RHETORICAL FUNCTION	RHETORICAL STRUCTURE
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Figure 1.4 : Functional Sequence of Legal Reasoning Moves and Steps

ESP and EALP practitioners embrace these innovative concept of specialist genre with success. Genre analysis is a useful tool to analyse thick description of academic and professional texts to arrive at a form-function correlation.

ESP and EALP teachers need to know how to:

- a) - identify legal reasoning
- b) - rhetorical knowledge (moves and structure) and,
- c) - in arbitrating on substantive knowledge (on points of law)

1.5.2 ESP and Easification

Bhatia (1993:146) expounded the concept of easification devices to anatomise components of syntactic structure in sentences to make it reader friendly to ESP/EALP learners thus reducing information loading. In other words, textualization of documents is easified and information is easily conveyed to intended readers/ audience.

Easification appears in the various forms of:

- a) - tree charts or diagrams (structured primarily to readers to strengthen their grasp of the legal facts)
- b) - flow charts (to easify a text) to enhance memorability.
- c) - cartoonised the concept or an issue to enhance cognitive memory embedded into long term memory. Pearson in 1983 on ESL)
- d) - Hypothetical case study to easify a legal issue
- e) - *Italicized* keywords (foreign terminology, caselaw, statutory provision and etc.)

This brings to mind the question of 'What determines learnability?' With the advent of the easification devices as learning tools, it provided better retention in learning items that can be rather complex. Therefore, with the aid of structural description of text in the form of categorisation or breaking down information into bit chunk sizes information that is vital for memory, reasoning, recognition system and problem solving. Visual recollection is enhanced. Bhatia qualifies that easification is not simplification and formulated 2 interactive move-structure in legislative writing to a simplistic version without distorting the will of the Parliament on such enactments. The 2 interactive moves are the legislating provisions and specifying conditions.

1.6 LIMITATION OF THE STUDY

The researcher's knowledge is confined to Bhatia's theory of legal reasoning move structure and easification devices and she will apply the method to the 5 introductory chapters of 5 textbooks amongst 11-12 academic Tort textbooks available in the education field. The 5 introductory chapters comprise of a corpus of 33,750 words altogether. Suffice to say that it is likely that all Tort introductions will all be quite similar.

1.7 STRUCTURE OF THE REPORT

Chapter 1 of this report will define the primary purpose and objective of this research significance of this study and the questions raised which piqued the researcher's interest in choosing this topic of study. Looking at the way legal authors organised the law according to the area of interest or which represents the core elements of law in Tort will inevitably raise curiosity in one, on how the legal authors drafted

the introductory chapters. It is important to explain that legislators are the first hand writers in drafting statutes and it is the judges who interpret the Acts of Parliament and arrive at a decision. Therefore, legal writers write a second hand account of the law in textbooks. Legal writers must consider who are their likely or intended readers at the initial stage that prove to be the yardstick to measure how their textbooks should be drafted i.e. according to the level of understanding and knowledge of the intended readers. The ideal approach to writing according to the type of readership goes back to the communicative purpose of these legal writers and having the intentions in mind, legal writing will conform to the suitability of their readers and facts and rules of the law will be clearly presented which will in return draw a wider readership. Inevitably, a detailed information on the development of genre and the considerable amount of research which has been conducted on done on Genre Analysis in the past based on different research materials for pedagogic purposes circumventing around genre analysis, leading to the present stage will be discussed in Chapter 2. Chapter 3 will contain collection of data chosen by the researcher and the methodology adopted and the subsequent analysis which leads to the findings from these introduction chapters on the law of Tort. The forwarding Chapter 4 will be the practical part of the researcher's study by narrowing down from the general to specific rule of the introduction chapters of these 5 texts from various legal authors by interpreting the structure of the text using the methods explained in Chapter 3. The analysis process is a 2 tiered process where Bhatia's approach is adopted using macro and micro move-analytical process to dissect these texts and the second stage will involve identification of generic patterns from the structural interpretation amongst these 5 texts and compare them to arrive at common issues which is deemed as relevant and necessary at this preliminary stage of the chapter in order of priority. Perhaps from the research, the findings would represent a model as to how the law fits together in Chapter 5.