

## **CHAPTER FOUR**

### **RESULTS OF ANALYSIS AND FINDINGS**

#### **4.0 INTRODUCTION**

This chapter will provide a detailed description of the structural interpretation of the 5 introductions of Tort Textbooks through the stratification coding process of macro and micro level. It is hoped that from this classification process, the researcher can infer that her aim in seeking a structural pattern of these Tort Introductions is validated and justified by the results acquired.

#### **STRUCTURAL INTERPRETATION :**

##### **4.1. TEXT 1 : BY COOKE**

(refer to Appendix A on page 77)

#### **STRUCTURAL INTERPRETATION AT MACRO LEVEL**

The **3 MAJOR MOVES** are as follows.

##### **MOVE 1 -- INTRODUCE THE SUBJECT MATTER**

1. Aim and Introduction
2. What is Tort?
3. Elements of Tort

##### **MOVE 2 -- DETAILS AND EXPAND THE SUBJECT MATTER**

1. The interest protected
2. Fault and strict liability
3. Objectives of Tort
4. Boundaries
5. Position of minors

### **MOVE 3 -- CONCLUDE AND COMPLETE THE SUBJECT MATTER**

1. Human Rights Act 1998
2. Summary
3. Further reading

#### **4.1.1 STRUCTURAL INTERPRETATION AT MICRO LEVEL**

##### **MOVE 1 - INTRODUCTION**

M1S1- Defines the purpose of this introductory chapter to explain the basic principles on the law of tort.

M1 S2 - The author, Professor John Cooke acknowledges the difficulty for students to understand the tort concepts.

M1 S3 - Defines what is tort.

##### **MOVE2 - DETAILS AND EXPAND THE SUBJECT MATTER**

M2S1 - Defines what are the elements of tort and illustrate the basic pattern of tort whereby a claimant can claim damages or remedy if some harm has been inflicted upon claimant that would attract legal liability.

M2S1 (a) - Cooke illustrates with a simple analogy to define the characteristics of tort law i.e. for tort to materialise, there has to be:-

<p style="text-align: center;">AN ACT + OMISSION + CAUSATION + FAULT + PROTECTED INTEREST + DAMAGE = LIABILITY</p>
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M2S1 (b) - Understanding of the above equation is enhanced by a hypothesis of motor vehicle accident.

M2S2- The variation in text is actually an exception to proving guilt.

M2S3 - Describes that there are 2 types of Torts. They are:-

- a) Tort caused by harm i.e. *damnum sine injuria* (Latin terminology)
- b) Tort caused without harm i.e. *injuria sine damno*.

Again an analogy of these legal concepts were hypothesised to enhance understanding and memorability.

M2S4 - Protected interest.

M2S5 – First paragraph begins by defining what is personal security i.e human being accountable for their own security.

M2S5 (a) - To illustrate how personal security is infringed, harmed and introduce the concept of assault and battery ( core contents of Criminal Law). This highlight the intertextuality of other law into the area of tort. Author also explain the area where a person has a cause of action if he was curtailed of his liberty of movement without reason. In other words being falsely imprisoned.

M2S5(b) - Explanation of personal security.

M2S5(c) - Medical treatment and nervous shock.

M2S6 - Property that is protected by - nuisance

- Rylands v Fletchers (1868)
- trespass to land.

M2S7 - Economic interest.

M2S8 - Second paragraph emphasises economic interest for being controversial and whereby a chapter will illustrate further on this topic and stress the overlap.(cross over of boundaries between law of tort and contract).

M2S9 - Stresses on the invasion of privacy and reputation of a person marred by untrue speech or in writing may seek recourse in the tort of defamation.

M2S10 - Role of policy. Explains that the courts of law have to weigh between opening

the floodgates to litigation and be overwhelmed by the Tort actions and to place heavy burden on defendant.

M2S11 - Explains the role of insurance companies in the face of tortious claims against the defendant. The insurance principle extends to professional indemnity whereby solicitors and accountants are protected by indemnity insurance should there be suits brought against these people in the course of performing their professional capacity.

M2S12 - The law of Tort rest on the premise of fault liability of the defendant in his commission or omission of actions which caused injuries to the claimant and strict liability.

M2S13 - Explains that malice is the first state of mind of the defendant.

M2S14 - Intention is the second ingredient to fulfil the state of mind of the defendant.

M2S15 - Explains that Negligence in Tort in this context as careless behaviour which negates the state of mind and introduces the objective test of a ' reasonable man ' in negligence regardless of the defendant's disabilities.

M2S16 - Defines strict liability. As a general rule in tort, fault must be proved however in certain exceptions, no fault is shown on the part of the defendant.

M2S17 - Explains the 2 objectives of Tort ie to compensate the claimant or the victim and to deter the defendant from repeating the negligence.

M2S17(a)- Explains Individual deterrence.

M2S17(b) - Explains what is a general or a market deterrence.

M2S18 - Describes how the defendant is made to compensate the claimant where the loss suffered by claimant would shift to the defendant to remedy the loss done. This is the doctrine of loss distribution.

M2S18(a) - Explains on the compensation culture as people having the propensity to engage in legal suits whenever negligence occurred in England and Wales and stressed

on the possible avenues that is available to claimant(s). Hence, the claimant(s) may seek recourse from the state benefits as well from private insurance apart from bringing tortious actions to court.

M2S18(b) - Explains that New Zealand does not have the Tort system and what is in place was the NO FAULT ACCIDENT COMPENSATION SCHEME in 1974.

M2S18(c) - Further explanation on the compensation culture with the benefit of the CFA's (i.e. conditional fee arrangements between the claimant(s) and lawyer(s). This is based on the premise of 'no win-no fee basis' and this could be another factor that opens the floodgates to many court cases in Tort.

M2S19 - Describes the distinction between the law of Contract and Tort.

M2S19(a) - Describes the distinction between strict liability in contract on the one hand and the fault based liability of Tort on the other.

M2S19(b) - Again stresses on restoring or putting the victim back to the position as if tortious act had not occurred.

M2S20 - Explains on the concept of concurrent liability where a claimant could make 2 claims simultaneously arising from the damage.

M2S21 - Explains that even minors have grounds to sue in Tort by way of applications through a next friend.

### **MOVE 3 – CONCLUSION AND COMPLETE SUBJECT MATTER**

M3S1 - Explains that with the enactment of Human Rights Act 1998, this Act gives statutory effect to and incorporates into English law, the European Court of Human Rights. It is the prerogative of this Act to require all common and convention rights to be interpreted compatible with provisions of the conventions.

M3S2 - Stresses on the conflict between Human Rights and Torts.

M3S3 - Provides a bullet point notes on key issues which make up the backbone of this

study of the law of Tort.

M3S4 - Suggests a list of resources for further reading.

## **TEXT 2 : BY HARPWOOD**

( Refer to Appendix B on page 90)

### **STRUCTURAL INTERPRETATION AT MACRO LEVEL**

#### **MOVE 1 - INTRODUCE AND ESTABLISH THE SUBJECT MATTER**

1. What is Tort?

#### **MOVE 2 - EXPAND AND DETAILS OF SUBJECT MATTER**

1. Boundaries of Tort and other areas of law
2. Caselaw
3. Other system of compensation
4. Tort of strict liability
5. Human Rights Act 1998

#### **MOVE 3 - CONCLUDE AND COMPLETE THE SUBJECT MATTER**

1. Summary of the objectives of Tort
2. Summary of chapter 1

### **4.2.1 STRUCTURAL INTERPRETATION AT MICRO LEVEL**

#### **MOVE 1 - INTRODUCE AND ESTABLISH THE SUBJECT MATTER**

M1S1 - Establishes the outline to this introductory chapter by spelling out the author's intention to firstly define objectives and the scope of the law of tort and provide an overview of the subject. The author also expresses his intentions of including other areas of law such as elements of constitutional law. This marks the intertextuality of legal genre in that some areas of law is not dealt with in isolation but rather there is correlations between the subject area.

M1S2 - Defines what is meant by the term TORT.

M1S3 - The author realises the difficulty in defining the tort concept based on previous attempts by tort writers. Different authors have different ways of approach in defining tort and each concurred that the definition was inadequate.

M1S4 - Describes the importance of drawing distinction between tort and contract law or tort and criminal law.

## **MOVE 2 - DETAILS AND EXPAND ON THE SUBJECT MATTER**

M2S1 - Explains the parameters of tort and contract within the context of duties fixed by law and duties fixed by the contracting parties.

M2S1 (a) - Describes how the tort of law operates whereby law imposed duties on people involved not to libel nor trespass onto people's land amongst others.

M2S1 (b) – There is a loophole on the fact that in modern law, the distinction between tort and contract is obscured as the terms of the contract does not merely rest on mutual agreement between contracting parties but rather the terms is to be framed within the provision of statutes.

M2S1 (c) - Defines the relationship between the parties by inserting hypothetical case scenario. In general a claim in breach of contract is only brought by the contracting parties but with the enactment of Contracts (Rights of third parties) Act 1999 enable third parties to enforce contractual terms.

M2S2 - Differentiates the objectives between tort and contract. In the former, the aim is to compensate for harm suffered which arise from breach of duty imposed by law. Tort law primarily focus on commission of wrongs (negligence) as opposed to missions. Tort law also serve as a deterrent vehicle to prevent people from causing harm (negligence).

The latter is focused on enforcing and performance of contractual term and promises and also to deter from breaching the terms of contract.

M2S2(a) –Raise a gap on the application of such theory in the real world especially so in cases of professional negligence who also have contractual relationship such as

doctors, surveyors, architects etc.

M2S2 (b) - The case of *Johnstone v Bloomsbury AHA* (1991) 2 All ER 293 further qualify the lack of difference to the outcome regardless if tort or contract was the chosen field of area to seek recourse.

M2S2(c) - Paragraph 3 defines limitation period as the yardstick in the choice of action in tort or contract. There are instances such as the case of *Henderson v Merrett Syndicates Ltd* (1994) where both tort and contract action are pursued simultaneously giving rise to concurrent liability on the tortfeasor or defendant.

This is followed by other cases such as :

- *Holt and another v Payne Skillington (A firm) and another* (1996) PNLR 179
- *Tai Hing Cotton Mill Ltd v Lui Chong Hing Bank Ltd* (1986) 2 All ER 947
- *Spring v Guardian Assurance* (1992) IRLR 173

M2S3 - Acknowledges the distinction between tort and contract is blurred especially when one consider the doctrine of promissory estoppel in contract.

This arises from the promise wrongly or falsely made by one party (A) the promisor to the other party (B) the promisee. and B placed reliance on the promise and thus suffered economic loss. The promisee has a right to enforce the performance of the false promise in court of law and the judge would order for the said performance or payment for the net worth of the loss suffered by the promisee (B).

At this preliminary stage it is important to note that for a contract to be enforceable there has to be some consideration. However, the doctrine of promissory estoppel works on the premise that the contract need not be carried out and estopped (stopped) by equity and no recourse on the part of B (promisee) can be made against the promisor (A).

By contrast, in the law of TORT a defendant is sued for damages or negligence on his part which caused the injury or harm to the claimant (victim) and the claimant need only prove relevant fact in order to succeed in his claim.

M2S4 - Refers to the case precedent of *Junior Books Ltd v Veitchi Co Ltd* (1983) where the principles of Tort are applied.



M2S5 - Defines the basic premise for an action in tort to be fault based and hence, the claimant who so suffered such harm or injury can seek compensation through damages awarded.

M2S5(a) - Introduces the concept of strict liability in contract, particularly where the law which relates to sale of goods is concerned.

M2S5(b) - Establishes the law on strict liability which applies to tort as well followed by the case of *Murphy v Brentwood DC* (1990) 2 All ER 908.

M2S6 - Describes how tort law seek to award damages to the claimant who suffered loss and the measurement of damages goes back to pre-incident position had the mishap or negligence did not occur.

M2S7 - Distinguishes contract where specific performance of the contract is enforced.

M2S8 – Highlights the overlap between tort and contract is blurred and acknowledged how the early textbook writers separate the two areas of law.

M2S9 - Begins by giving an example of a road accident where the victim may seek claim in both tort and criminal law. That being in tort, the victim can sue for failure to take reasonable care to ensure safety of others in close proximity and in criminal law for not adhering to the Road Traffic Act to ensure safety of road users.

M2S9 (a)- Paragraph 2 emphasises on the breach of duties on the part of both tort and criminal law.

M2S10 - Concludes that similarities and differences between tort and contract and tort and criminal law has been defined albeit at a surface level.

M2S10(a) - Highlights the difficulty of the boundaries of these particular law.

M2S11 - Explains the role of Insurance in compensating for tort cases. Insurance as the vehicle to pay for wrongs or negligence of tortfeasor as in

- Road Traffic Act 1988
- Employer's Liability (Compulsory Insurance) Act 1969.

M2S12 - Demonstrates how insurance can act as a deterrence to avoid accidents due to high premium paid. This is followed by a study in 1999 by the Office for National Statistics that fatalities are mostly men under 25 than the older group of motorists.

M2S13 - Introduces what is known as NHS TRUSTS in England and Wales.

M2S14 - Expresses the possibility of people being less responsible since insurance can pay for their negligence, in addition to judges being in favour of ruling the defendant to pay as opposed to morally the defendant should not be held responsible. The case in point is *Nettleship v Weston* (1971) 2 QB 691.

M2S15 - The author qualifies that in other cases such as *Morgan v Launchbury* (1973) AC 127 rule that insurance should not be the focus in the determination of liability.

M2S16- Introduces an overview of the law of tort where duties and interest of the parties are the main concern. Historically gives an account on how tort is used to protect personal interest in property which includes torts of nuisance and trespass to land.

M2S16(a) – This extends to how tort can protect people from:

- intentional interference,
- assault and battery.
- false imprisonment and
- preservation of reputation through suits for libel, slander , malicious prosecution and injurious falsehood.
- purely financial interest and
- economic and trading.

This is supported by the case of *Chester v Afshar* (2004) UKHL

M2S16(b) - The author announces the recognition given by the landmark case of *Donoghue v Stevenson*. in 1932 and the development of tort being extended to the tort of breach of confidence is the case of *R v Department of Health ex p Source Informatics* (2001) QB 424.

M2S16(c) - Distinguishes the law with *Saltman Engineering Co Ltd (1963) 3 All ER 413* whereby the principle held is to merge the principles of equity and the tort of breach of confidence together.

M2S17 - Introduces the Human Rights Act 1998

M2S18 - Explains with illustration of the case of *Three Rivers DC and Others v Bank of England (No3) (2000) 3 All ER 1* that a public officer is only liable for the tort of misfeasance if he acted knowingly or without regard to the likelihood of causing injury to the claimant.

M2S18(a) - Describes that members of police force is not exempted from liability should they conspire to injure the public. This is observed in the case of *Docker v Chief Constable of West Midlands Police (2001) 1 Ac 435* and especially so if a constitutional right of the claimant is infringed as in the case of *Watkins v Secretary of State for the Home Department (2004) EWCA Civ 966*.

M2S18(b) - Explains that exemplary damages is awarded following the success of a claim in misfeasance in public office supported by the case of *Kuddus v Chief Constable of Leicesterrshire Constabulary (2001) UKHL 29* and *Iqbal v Legal Commission Services QBD, 6th August 2004*.

M2S19 - Introduces the concept of *damnum sine injuria* ie a wrong without a legal remedy. The landmark case is *Bradford Corp v Pickles (1895)* followed by *Arcott v The Coal Authority (2004) EWCA Civ 0892*.

M2S20 - Demonstrates the opposing law to the above law i.e. *injuria sine damno* (where no injury is suffered but claimant could claim in a tort action.) An example of which is trespass to land. No harm is inflicted upon the land owner but he can seek compensation from tortfeasor for trespassing onto his land.

M2S21- Explains the development of caselaws and recognition of The Human Rights Act 1998.

M2S21(a) - Acknowledges the grey area of tort and the complexity of overlapping legal elements and introduce the landmark case of *Donoghue v Stevenson (1932) AC 562* as

the focal point to understand the tort principles. Further, it stresses that it is at the end of the study on the law of tort that one is able to comprehend and grasp an overall picture of Tort law.

M2S21(b) - Suggests rereading this introductory chapter once a reader has finished reading this book.

M2S22 - Introduces the law on strict liability.

M2S22 (a) - Defines the ambit of strict liability.

M2S22(b) - Explains that the construct of strict liability may be archaic but there is also recent statutory enactment such as Consumer Protection Act 1987.

M2S22(c) - Illustrates how strict liability is imposed by :

- the judges such as the case of Rylands v Fletcher 100 SJ 659 (1868)
- the European Union giving cognisance to strict liability.
- the Consumer Protection Act 1987
- the Vaccine Damage Payments Act 1979.

M2S23 - Concludes with an illustration of the situations where strict liability is embraced.

M2S24- Explains that since the enactment of Human Rights Act 1998, the national law must be decided according to the European Conventions of Human Rights.

M2S24(a) - Stresses on a few statutory provisions which is inconsistent with the values of Human Rights Act 1998.

M2S24(b) - Explains the Convention rights which is most prominent such as :

- Article 3 : degrading treatment or punishment
- Article 5 : right to liberty
- Article 6 : right to a fair trial
- Article 8 : right to respect for privacy, family life, home and correspondence

- Article 10 : right to freedom of expression
- Article 11 : right to freedom of assembly and association

### **MOVE 3 - CONCLUDE AND COMPLETE THE SUBJECT MATTER**

M3S1 - Offers a summary of the objectives of tort which is divided into 7 limbs.

They are:

- Compensation
- Protection of interest
- Deterrence
- Retribution
- Vindicator
- Loss distribution
- Punishment of wrongful conduct

M3S2 - Illustrates the operation of the tort system in the form of a hypothetical motor vehicle accident case study where issues of the objectives of tort law and its relationship with other system of compensation.

M3S3 - The hypothetical case study situation itself.

M3S4 - Raises the question of whether the objectives of tort has been met in the above hypothetical case study.

M3S5 - Recap of the overview of the law of tort whereby the author sums up the 7 areas of interests which make up the entire content of the introduction. They are:

- Problems in defining what the law of tort is
- Protection of interests
- Insurance and tort
- Strict liability
- Other system of compensation
- Human Rights and Tort
- Objectives of Tort
- Conclusion

The author approaches the law of tort by providing the traditional essay content of the materials followed by a hypothetical case study which circumvent the areas of tort law. This method in fact reinforced memorability of the issues of law and draws on the analysis from the reader. This is accorded with a nutshell summary of the entire introduction chapter.

#### **4.3 TEXT 3 : BY MURPHY**

(refer to Appendix C on page 99 )

##### **STRUCTURAL INTERPRETATION AT MACRO LEVEL**

###### **MOVE 1 - INTRODUCE THE SUBJECT MATTER**

1. What is Tort?

###### **MOVE 2 - EXPAND THE DETAILS OF SUBJECT MATTER**

1. Protected rights
2. Theoretical perspectives

###### **MOVE 3 - COMPLETE AND CONCLUDE SUBJECT MATTER**

1. Tort and other branches of common law (boundaries)

#### **4.3.1 STRUCTURAL INTERPRETATION AT MICRO LEVEL**

###### **MOVE 1 - INTRODUCE THE SUBJECT MATTER**

M1S1 - Raises the question of "What is a Tort?" and imagine the difficulty in understanding what the word tort is for law students.

M1S1(a) – Defines the definition of tort by Winfield and Birks.

M1S2 - Explains the difficulty in defining the boundaries between tort and contract and emphasise that the distinction is blurred.

###### **MOVE 2 - EXPAND THE DETAILS OF SUBJECT MATTER**

M2S1 - Declares that the prominence is on the functions and purposes of tort law.

M2S1(a) - Describes the law of tort as obligations imposed on members of society and should the obligations be breached, it will attract liability on the part of the tortfeasor and damages is awarded to the claimant.

M2S1(b) - A question is raised on "Who should bear the cost?" This marks the shift of loss suffered by claimant to the defendant.

M2S1(c) - Introduces the concept of compensation system.

M2S2 - Qualifies that the basic premise on the law of tort do not rest on compensation and monetary damages.

M2S3 - Describes Tort and the fundamental human interests.

M2S4 - Announces author's previous edition of this book and how he changes his approach to one which is more pragmatic and consistent to the tort syllabus being taught in most leading schools in UK.

M2S4(a) - Declares that interest based approach is not totally ignored.

M2S5 - Explains that human rights are protected under Human Rights Act 1988.

M2S6 - Dismisses the misconception that European Convention on Human Rights has been incorporated into English law but rather primacy of Convention rights should be embraced as opposed to national law should there be inconsistencies between the two.

The constant harmonization of legislation within Europe entails the translation of primary and secondary EU legal instruments in the now 21 official languages within the European Union.

M2S7 - Explains what are the fundamental rights and freedom of the Conventions which included Section 11 of the Human Rights Act 1998 which stressed on the parameters of Convention rights.

M2S7(a) - Further explains that Convention rights are also enforceable on public authorities.

M2S7(b) - Highlights the fact that in certain instances, Convention rights are not enforced due to the fact that the common tort law share similar ambit of a particular area.

M2S8 - Defines who is a public authority.

M2S8(a) - Extends the definition to include newspaper agency, schools and universities as well as charitable organisations such as NSPCC all of which would fall under the purview of Sec 6(3)(b) of Human Rights Act 1988.

M2S9 - Defines the scope of trespass and harassment to include "snoopers". Further discussion on the topic of protection of privacy is dealt with in chapter 15.

M2S10 - Distinguishes a person's right to a fair trial as merely a procedural guarantee and does not bear any substantive civil law rights as stipulated in Article 6 of the Act.

M2S11 - Introduces the doctrine of parliamentary sovereignty which falls within the ambit of constitutional law and stressed that prevalence of Convention rights is observed without striking down that particular common law.

M2S12 - Introduces the competing interests that a person can make claims. accorded with an illustration of freedom of speech as well as protection from libel and slander be it written or spoken. Hence, to enforce protection from deliberate publication that would be injurious to the person, he is restricted from free speech. In other words, a protection of privacy and reputation will delimit the freedom of speech.

M2S13 - Explains the various types of interests that the tort of law protects.

M2S13(a) - Describes intentional invasion of personal and proprietary interests i.e the law of tort is structured that encompasses from intentional physical harm to another person, restriction to movement and protection from interference to tangible property, that being on land and goods.

M2S13(b) - Explains modern development of tort law to include 'Convention rights' :  
- to life based on Article 2



- Article 3 - protection from torture and degrading treatment
- Article 4 - freedom from enslavement
- Article 5 - liberty
- 1st protocol Article 1 - peaceful possession of property

M2S13(c) - Describes the interests in economic relations , business and trade interests where the author acknowledges that economic torts is still a **grey area**. This is pertinent to the conflict between protection of a person individual economic interests and a person's right to free competition in business in a market economy. In addition passing off and deceit is included is under this heading.

M2S13(d) - Describes interests in intellectual property where confidential information, copyrights and patents will present greater problem as opposed to the clear cut protection of interest from interference into tangible property enunciated by common law.

M2S13(e) - Protection of interests in intellectual property is entrenched in statutory provisions and explain the commonality of overlap between intellectual property and economic relations.

M2S13(f) – Provides an exception to the general rule by offering a scenario where confidentiality of patient's record and communication is protected and the preservation of a multinational company's trade secrets.

M2S14 - Introduces the landmark case of *Donoghue v Stevenson* (1932) AC 562 where personal safety within limits and mental integrity, property and economic interests is protected.

M2S14(a) - By the same token since harm need not be directly inflicted upon claimants,caution is needed when considering economic interests.

M2S14(b)- Introduces the tort of nuisance and the famous case of *Rylands v Fletcher*.

M2S15 - Highlights the problem of tort of libel and slander that is aimed at protecting a person's reputation especially to a person's privacy interests considering there are partial

and full defences which enable the defendant to act in that manner and it will be dealt with in chapter 15.

M2S16 - Explains on the tort of malicious prosecution of the judicial process and such protection is stipulated in Article 6 of the European Convention on Human Rights.

M2S16(a) - Describes European Community Law rights. This deals with where the action involved an European element, the UK courts must give cognisance to the Law of the European Community. Such was the case in *Francovich v Italian Republic* (1993) 2 CMLR 66. In other words, the European law must prevail over the common law.

M2S16(b) - This leads to the development of 'EUROTORT' principle and Lord Slynn in *R v Secretary of State for Transport ex p Factortame Ltd* advocated the conditions that must be satisfied before a member state can be held liable. The [National court must find that :

- a) the relevant RULE OF COMMUNITY LAW is one which is intended to confer rights individuals;
- b) the BREACH must be sufficiently serious.
- c) there must be a DIRECT causal link between the breach and the loss complained of.]

M2S17- Explains the objectives of tort law.

M2S17(a) - Question is raised whether to employ the term the law of tort or the law of torts considering the facets of interests that torts protect which is purely academic and of no pragmatic significance.

M2S18 - Introduces the Latin maxim *damnum sine injuria* which means harm without (recognized) injury and *injuria sine damno* (recognized) injury without harm. *Damnum sine injuria* merely means even though the claimant suffered some sort of harm but there is no remedy for the damages as the interests are not protected by the law of tort. By contrast, *injuria sine damno* provides for a course of action because of the interested violated is so pertinent even with no tangible proof of damage.

M2S19- Explains on the types of wrongdoings, deliberate interference or intervention

of person(s)' interests and introduces the principle of strict liability whereby the claimant need not prove fault.

M2S19(a) - Malice and motive is not the core ingredient to seek for damages even if the act is malicious as in competing businesses unless the interests violated is protected by the law of tort.

M2S20 - Traces the history of forms of action whereby before the invocation of Common Law Procedure Act 1852 and the Judicature Act 1875, a claimant's right of action derived from the writ of summons.

M2S21 - Explains that these forms of action is abolished and a claimant need only prove the relevant facts for tort of trespass which is based on private nuisance but would fail if the action is brought by pleading the rule in *Rylands v Fletcher* as all requirements of the above case must be met.

M2S22 - Therefore it is crucial to know both ingredients of each tort and the general principles of tort.

M2S23 - Explains the certainty and justice especially on the land title of a particular land and the title holds good indefinitely.

M2S23(a) - Clarifies the confusion of entrants onto land by categorising them into 3 classes such as invitees, licensees and trespassers. However, with the enactment of Occupiers' Liability Act 1957, the boundaries is clear cut.

M2S24 -Describes about loss distribution in that the loss that the victim suffers shifted to the defendant and this accountability would deter people from causing negligence and to exercise due care in the future. In addition the gravity of the breach is to be measured according to the clarity of the community rule breached and according to the legislative discretion of the member state.

M2S24(a) - Introduces the principle of vicarious liability the employer is accountable for the tortious acts of his employee in the course of his employment.

M2S24(b) - Extends the same precept of the principle in the area of insurance. That being, as long as one is insured, the insurance company is made responsible for the negligent infliction of harm onto 3rd parties.

M2S25 - Describes the counter productive aims of compensating claimants that it undermine a claimant from avoiding tortious conduct.

M2S26 - Introduces the concept of 'calculated negligence' to eradicate the fear of claimant behaving without due care.

M2S27 - Stresses that tort is not punitive but rather compensatory for negligence.

M2S28 - Reveals the test for negligent conduct propounded by Learned Hand J in *United States v Carroll Towing Co.* 159 F 2d 169 (2d Cir 1947) at 173.

M2S29 - Introduces the issue of economic analysis as the yardstick to measure the system of compensation.

M2S30 - Explains judges' implied acceptance of laissez-faire relating to economic transactions.

### **MOVE 3 - CONCLUDE AND COMPLETE THE SUBJECT MATTER**

M3S1 - Addresses on the limitations on the effectiveness of Tort law.

M3S1(a) - Acknowledges that the judicial system may deny a remedy on the grounds of trespass through mere touching. In other words, the court of law will not consider trivial claims such as the likes of avarice, brutal words or ingratitude.

M3S1(b) - Acknowledges the difficulty in quantifying the damages with mathematical equations. The quantum of damages awarded for the tort of false imprisonment and for the breach of contract for failure to fulfil a sale of goods agreement are not the same.

M3S2 - Explains torts and other areas of common law. Acknowledges that the tripartite classification of the law of Tort, the Law of Contract and the law of unjust enrichment are often difficult as to quantify and ascertain the award of damages as they often

overlap one another. To trace historically the function of contract to ensure performance of a contract or an agreement and the law of Tort in comparison is to refrain one from infringing another's non-contractual rights and interests which has cognisance in law.

M3S3 - Introduces the landmark case of Hedley Byrne & Co v Heller & Partners Ltd (1964) AC 465 followed by Henderson v Merrett Syndicate (1994) 3 All ER 506.

M3S4 - To conclude on the principles, aims and objectives of the law of Tort to be studied in isolation from other common laws.

M3S5 - Further qualifies that certain types of conduct constitute a crime and a tort that is supported by an illustration of theft whereby in criminal law the remedy is to lay the law against the thief according to statutory provisions. On the contrary, in the area of tort, the remedy would be to compensate the claimant or invoke an injunction.

#### **4.4 TEXT 4 : BY QUINN**

(refer to Appendix D on page 109 )

### **STRUCTURAL INTERPRETATION AT MACRO LEVEL**

#### **MOVE 1 - TO INTRODUCE THE SUBJECT MATTER**

1. Compare Tort with other legal wrongs (Boundaries)

#### **MOVE 2 - TO EXPAND AND PROVIDE DETAILS OF SUBJECT MATTER**

1. The role of policy
2. Tort and the requirement of fault
3. Reasons for the requirement of fault
4. Arguments against the requirement of fault
5. Alternative methods of compensation for personal injury
6. Alternative methods for making wrongdoers accountable
7. Reform of the tort system

#### **MOVE 3 - TO COMPLETE AND CONCLUDE SUBJECT MATTER**

1. Summary
2. Reading list

### 3. Internet resources

#### 4.4.1 STRUCTURAL INTERPRETATION AT MICRO LEVEL

##### MOVE 1 - TO INTRODUCE THE SUBJECT MATTER

M1S1 - Begins by describing the areas where a person can claim under the law of Tort such as :

- injuries sustained from road accident
- medical negligence which caused harm to patients
- a celebrity defamed by a newspaper
- wrongful arrest of a citizen by the police and
- unlawful entry to land i.e trespassed onto people's land

M1S2 - Acknowledges the difficulty in defining the law of Tort but the general rule of a Tort is where there is a breach of a general duty fixed by law.

M1S2(a) - Explains on the remedy for tort is monetary compensation and it is borne by the tortfeasor (the wrongdoer).

M1S2(b) - Explains that a claimant can be remedied when some degree of harm is inflicted upon claimant unless in instances where the claimant only needs to prove relevant tort has been committed without having caused any harm to claimant and this principle is known as *injuria sine damno* which means (recognized) injury without harm such as trespass on land.

M1S3- Comparison between tort and other legal wrongs such as the distinction between torts and crimes. In the former, the action is between the wrongdoer (tortfeasor) and claimant and the primary aim of tort is to award compensation to the victim for the harm done whereas in the latter, a crime is a wrong punishable by the state.

M1S4 - Acknowledges that the distinction between Tort and crime is often blurred in some instances of tort cases where the damages awarded is so high that it is akin to a punishment to the defendant whilst in some criminal cases, compensation is to be preferred.

M1S5 - Defines the distinction between Tort and Contract. Tort deals with breach of duty stipulated by law whereas breach of duty is fixed by the contracting parties.

M1S6- Acknowledges the obscurity between the two areas of law.

M1S7 - Explains that a defendant can be liable for both tort and contract along with a hypothetical situation of a house owner who suffered injuries due to the building works done to his home. In this instance, the claimant can claim under tort for negligence as well as for breach of contractual terms i.e to take reasonable care to ensure safety and reliability of the construction.

## **MOVE 2 - TO EXPAND ON DETAILS OF SUBJECT MATTER**

M2S1 - Introduces the role of policy especially where insurance agencies are concerned.

M2S2 - Explains the rule of thumb where a person is made to suffer some sort of injury or harm, a remedy is always available to compensate for physical or financial loss.

M2S2(a) - Qualifies that pragmatically, tort process is costly and defeat the purpose of seeking redress for a small sum as compensation. This is evident in the English courts of law to open the floodgates to allow all claims to be heard.

M2S2(b) - In comparison to UK courts' reluctance to take on all trivial cases, in America it is probable that US citizens would like to pursue any actions in court so much so that it serve as stagnation to medical professional to introduce new techniques in medicine for fear of legal suits against the members of the medical community. The advantage of such fear is that due care is given to patients instead of administering something that could be harmful to patients and the downside is there will not be a new pathway to better treatment for patients.

M2S2(c) - Explains that such boundaries have been discussed in nervous shock and in the recovery of economic loss in negligence.

M2S3 – Supports the issue of policy with Sec 1 Compensation Act 2006 whereby in the process of deciding whether the defendant considered the standard of care, the court:-

[...may ... have regard to whether a requirement to take such steps might-

a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or

b) discourage persons from undertaking functions in connection with a desirable activity.

M2S4 - Explains that this clause was the outcome from people in Britain who are ever ready to sue even if its on trivial issue. This phenomenon of 'Compensation Culture' stems from US citizens who would not stop short of seeking recourse for trivial issues.

M2S5 - Dismisses the notion of 'compensation culture' with the results from BETTER ROUTES TO REDRESS that on the contrary to the belief that the statistics for personal injury litigation has actually scaled down.

M2S6 - Explains that in certain tort actions it is necessary to prove fault, state of mind of the defendant, negligence and malice on defendant to indict him of tort(s) committed.

M2S6(a) - On the contrary, the principle of strict liability rest on the no fault requirement. In other words, no proof of fault is required to make a tortfeasor liable for his negligence.

M2S7 - Defines what is the meaning of intention followed by an illustration.

M2S8 - Explains what is meant by negligence.

M2S9 - Describes the meaning of malice to mean unlawful act with an ill intention.

M2S10 - By contrast to the general principle of fault based liability in tort, strict liability tort is one which does not require to prove fault.

M2S11 - Referring back to the general principle of fault based liability in tort as a requirement in Tort actions.

M2S12 - Again, the author tenders arguments against the requirement of fault.



M2S13 - Describes other methods of compensation for personal injury i.e. :-

- (a) - the social security system
- (b) - insurance
- (c) - compensation for victims of crime
- (d) - the NHS complaints system
- (e) - special funds
- (f) - no fault system
- (g) - alternative methods of making wrongdoers accountable

M2S14 - Discusses on reforms of the tort system.

M2S15 - Raises a hypothetical question on the proof of fault and what is the feedback supported by a possible answer.

### **MOVE 3 - TO CONCLUDE AND COMPLETE THE SUBJECT MATTER**

M3S1 - Summarises the introduction chapter by providing issues pertinent to the law of Tort and provide key points under the headings.

M3S2 - Provides a list of reading resources to for further reference.

M3S3 - With the advent of internet resources whereby a reader of Tort can extract information.

#### **4.5. TEXT 5 : BY HEUSTON**

(refer to Appendix E on page 117)

### **STRUCTURAL INTERPRETATION AT MACRO LEVEL**

#### **MOVE 1 - TO INTRODUCE THE SUBJECT MATTER**

1. Forms of actions

#### **MOVE 2 - DETAILS AND EXPAND ON THE SUBJECT MATTER**

1. Justice according to law.

#### **4.5.1 STRUCTURAL INTERPRETATION AT MICRO LEVEL**

##### **MOVE 1- TO INTRODUCE THE SUBJECT MATTER**

M1S1 - Begins by introducing a person's claim against injuries inflicted upon him by the defendant is supported by a writ of summon which dated back to the 14th century. In other words, there is no cause of action in court without a writ of the king's common law.

M1S1(a) - Explains that every cause of action must have a recognised form of action and the original writ.

M1S1(b) - Explains that this system of writ summon subsisted for 500 years.

M1S2 - To introduce the enactment of Common Law Procedure Act 1852 whereby it is stated that it ...[ it shall not be necessary to mention any form or cause of action in any writ of summons ] but more recently the RULES OF COURT has interpreted the provisional clause to mean that it is desirable to state the cause of action in the writ even though it is written as unnecessary.

M1S2(a) - Further explains the cause of action today merely means the facts of the situation that enable a claimant to seek remedy from the wrongdoer in the court law. Therefore, there is no requirement to plead trespass or conversion as the ground to pursue redress in court. All that is required is for the pleader (claimant) to prove the material facts of the case or prove the relevant facts.

M1S3 - Explains that so long as the pleader (claimant) has a right, the law will provide a remedy. In other words, if no remedy is provided this would tantamount that no evidence were tendered. Hence, no right existed is in the first place.

M1S4 - Describes the need to understand the nature and scope of the forms of action for reasons:

- to those who are ignorant of the archaic laws on liability for civil injuries especially in distinguishing between trespass and case. to date, some remedy still adopt the existence, nature and extent of liability according to the kind of writ or remedy

under the old law. An illustration of the case would be *Esso Petroleum Co Ltd v Southport Corporation* (1956) AC 218.

M1S5 - Comparison between earlier case of *Esso Petroleum* and *Wagon Mound*

## **MOVE 2 - DETAILS AND EXPAND ON THE LAW**

M2S1 - Justice according to law. The author acknowledges the great confusion in understanding the law of Tort but the general rule of Tort are the commission and omission of acts of the defendant which give rise to a cause of action in the court of law.

M2S1(a) - To state that the judges should as much as possible not to depart from the long established rules of law .This introduces the doctrine of *stare decisis* i.e the doctrine of legally binding precedents.

M2S1(b) - Impresses that [justice according to law is the common law ideal.]

M2S2 - Long established rules of law can be traced historically to the Tudor age where the case is tried according to strict logic and high technique according to the Inns of Court and rooted in the Year Books as well as rooted in the centuries and not dependant on common sense or unanalysed instincts.

M2S3 - Illustrates a hypothetical situation of a person charged for escape of fire and the defense counsel contended that it would be too harsh a sentence but the same principle of law remain unchanged till today. There is no new remedy on the grounds of convenience and economics.

M2S4 - Metaphor of "*a dog in the manger*" is used to illustrate a mean spirited person who selfishly deprived others of an advantage which he does not have a need for. In other words, to deny people to enjoy the things that are useless to them. Such was the case in *Anchor Brewhouse Developments Ltd v Berkley House Ltd* (1987) 2 EGLR 173 whereby as attached structure on owner's land overhangs onto his neighbour's land will be deemed as trespass even if the interference is at a height that would not affect the neighbour's land.

M2S5 - Differentiates between trespass and case by defining 'trespass'. Trespass is understood by lawyers and laypeople in its bare form [as any infringement or transgression of a rule of right ] which is paralleled to the meaning used in the Authorised Version of the Bible.

M2S6 - Introduces 2 types of trespass i.e action of trespass and trespass on the case (abbreviated as the case). Trespass in its true legal sense means legal wrong where the remedy for the writ of trespass is available to all forcible and direct injuries to persons and chattels whereas trespass on case deals with injuries that are not as a result of trespass. That is to say the injuries were not forcible and not direct but merely consequential.

M2S7 - Defines the term ' forcible' to mean [any act of physical interference with the person or property of another.] followed by hypothetical situations such as:-

- mere touching without lawful justification
- to physically beat a person with a stick
- to cross over another man's land
- to break into a person's house are all deemed as torts of trespass

M2S8 - Trespass on the contrary deals with no physical interference such

as :

- libel
- deceit
- malicious prosecution

M2S8(a) - Defines the term 'direct.' What amounts to a trespass requires both ingredient of 'forcible' and 'direct' injuries. Direct injuries as the word suggest means that the injuries sustained immediate flows from the defendant's action.

M2S8(b) - Distinguishes between direct and consequential injuries. Consequential injuries means some obvious and visible intervening cause.

M2S9 - Explains the penalty of the action in trespass and followed by an illustration of man throwing a log into highway. If a person is hit directly, it is trespass ( for direct harm) and if injuries occurred much later it is a case (for indirect harm).

M2S9(a) - Qualifies that these two distinction is not to be misconstrued as intentional and accidental or a negligent injury.

M2S10 - Explains that in the early case of *Leame v Bray* (1803) 3 East 593 602 which holds the defendant liable for negligently driving his carriage to collide with plaintiff which amount to an action in trespass. Intention is irrelevant. In trespass, what must be proved are the relevant facts.

M2S10(a) - Explains the term 'damage' as the ingredient that the plaintiff must prove in order to succeed in an action. The onus is on the plaintiff to prove damages.

M2S10(b) - Explains the exception to the rule is trespass which need not prove fault but is actionable per se. This is relevant to infringement of privacy or personal liberty.

M2S11 - Raises a question as to which action is preferable, trespass or case? Personal injuries actions brought against employer for being vicariously liable for the torts of his employee.

M2S11(a) - This stems from the fact that a plaintiff must prove negligence on the part of the defendant's conduct on the highway which resulted in damages to him or to his chattels (property), or where the claimant's property beside the highway was damaged as a result of the defendant's conduct on the highway. Further, the court has long recognized actions against medical members of the profession as medical negligence and not trespass.

M2S12 - Provides a clearer understanding of the distinction between an action on trespass and a trespass case by in the case of *Wilson v Pringle* (1987) QB 237, 247 whereby if the personal injuries sustained arose from an unintentional contact between the plaintiff (claimant) and the defendant, the defendant will be tried for negligence. Contrary to this, if the personal injuries sustained were direct consequence of an intentional contact, then the action of trespass will be adopted.

M2S13- Explains that in Australia, the two causes of action were distinct from one another and that the action on trespass is still recognized in Canada and in the UK, the concept of Trespass is applied albeit differently in the Theft Act 1968 Sec 9 (1) where [entry is regarded as a trespasser.] and Family Law Reform Act 1969 Sec 8 enable [a minor to give valid consent to acts which would otherwise constitute a trespass to his person.

## **4.6 RESULTS OF ANALYSIS AND FINDINGS**

### **4.6.1 MAIN FINDINGS : COMMON PATTERNS/ MOVES**

From the analysis, one is able to identify a generic structure from the 5 texts or discourses. Crystal (1992:25) regarded one introductory text as one discourse. Consider an inverted triangle as a simplest form of an analogy to define how the macro and micro analysis was conducted leading to the conclusion that the most salient feature of the structure of a legal text is highly formulaic and stereotypical. Having said that, a legal text drafted according to the legal structure conventions is easier to read, understand and remember. The characteristics of legal writing will inevitably employ these patterns of introducing and defining the law concepts and doctrines, application of the rules of law, decisions upheld or quashed by the court of law etc. The writing skills will include :

- a) Contrasting and comparing legal concepts, giving an account of 2 opposing points of view
- b) Cause and effects
- c) Sequencing
- d) Problem-solution
- e) Persuasion

From the staged process of macro and micro analysis, one is able to see the generic structure which characterise the essence of the law of Tort by identifying the commonality of issues described by these authors, the additional stress on certain areas of Tort which is ancillary and considered as surplus rules to the law of Tort, that being the essential doctrines has already been discussed. The result from the analysis is best explained in a two-tiered fashion. Firstly, a chart representation of similar rules of law adopted by these authors and secondly the researcher will stress on the generic structure of these introductory texts which is conventionally adopted by legal authors of law textbooks. (Please refer to the next page.)

**Table 4.1 : A chart representation of the common features**

MICRO MACRO	TEXT 1: COOKE	TEXT 2: HARPWOOD	TEXT 3: MURPHY	TEXT 4: QUINN	TEXT 5: HEUSTON
<b>MOVE 1</b>  <b>INTRODUCTION</b>	DEFINITION M1S1/M1S3	DEFINITION M1S2	DEFINITION M1S1(a)		
				INTERESTS THAT CAN BE CLAIMED M1S1	
					DEVELOPMENT OF THE TORT SYSTEM M1S1
	DIFFICULTY M1S2	DIFFICULTY M1S3/ M1SS2 (b)	DIFFICULTY M1S1	DIFFICULTY M1S2	CONFUSION M2S1
				DAMNUM SINE INJURIA M1S2 (b)	
<b>MOVE 2</b>  <b>MIDDLE</b>			BOUNDARIES BETWEEN CONTRACT AND TORT M1S2	BOUNDARIES BETWEEN CRIME AND TORT  M1S3 TORT AND CONTRACT M1S5 OBSCURITY M1S6	
	DAMNUM SINE INJURIA M2S2		DAMNUM SINE INJURIA M2S18		
		HUMAN RIGHTS ACT M2S24	HUMAN RIGHTS ACT M2S5		
	STRICT LIABILITY M2S12	STRICT LIABILITY M2S5(a)	STRICT LIABILITY M2S19	STRICT LIABILITY M2S6(a)	
		CONTRACT M2S5 (b)			
COMPENSATION M2S17	COMPENSATION M2S5	COMPENSATION M2S1(a)	COMPENSATION M1S2(a) / M2S2		
	SUGGEST REREADING INTRODUCTION M2S21 (b)				
<b>MOVE 3</b>  <b>CONCLUSION</b>	HUMAN RIGHTS ACT 1998 M3S1				
	HUMAN RIGHTS ACT 1998 AND TORT M3S2				
			LIMITATIONS M3S1		
			DIFFICULTY 'DISTINCTION BLURRED' M3S2		
			TORT IN ISOLATION M3S4		
	SUMMARY (BULLET POINT FORM) M3S3	SUMMARY M3S1		SUMMARY (BULLET POINT FORM) M3S1	
		HYPOTHESIS ENCOMPASSING AREAS OF TORT DISCUSSED			
	READING LIST M3S4			READING LIST M3S2	
	RECAP M3S5		INTERNET ACCESS M3S3		

#### **4.6.2 ORIENTATION**

From the structural analysis , one may identify these trends or stylistics common from the legal writers arising from the recurring regularities of similar issues. One may assert that there is a striking similarity on the generic structure i.e. the authors began with a brief introduction on law of tort and raised the thematic issue on "What is Tort?", followed by the role of insurance and highlighted on strict liability whereby a tortfeasor is blameworthy even though fault is not clearly seen.

From the above analysis, in order to understand how the law is organised on introduction chapters of the law of Tort, aimed at successful communication with their intended readers. BUNTON structure (1998) i.e. TOPIC - ANALYSIS - DISCUSSION type of structure would be adopted to interpret the structural organizational pattern or chronological ordering typical of legal genre.

Therefore, each sentence is interpreted and categorised as steps and each unit of law is divided into ELEMENTS AND CONSEQUENCES according to the method in organising law. In doing so, one is able to narrow the scope and form a checklist of the issues provided by these 5 authors and one is able to identify the common issues dealt with and see the branching of the subject matter and the similar patterns involved.

In fact this can be observed from Harpwood's introduction chapter on page 94 under the heading of OTHER SYSTEMS OF COMPENSATION and each element will represent a function and is shown in Table 4.2.



**Table 4.2 : An illustration of element, theme and move sequence from Harpwood**

<b>ELEMENTS/FUNCTION</b>	<b>THEME AND LEGAL REASONING 'MOVES'</b>	<b>MOVES SEQUENCE</b>
Strict Liability	Introduction	M2S22
Define	Ambit of strict liability	M2S22(a)
Illustrate	Illustrate with a statutory enactment ie Consumer Protection Act 1987	M2S22(b)
More illustrations	Application of strict liability on caselaw such as in Rylands v Fletcher (1868) as well as statutory cognisance of the law in Consumer Protection Act 1987 and the Vaccine Damage payments Act 1979	M2S22(c)
Conclude	Situations where strict liability applies	M2S23

Another example of how the law is organised and structured can be seen from Cooke's Introduction text.

**Table 4.3 : An Illustration of Element, Theme and Move Sequence from Cooke**

<b>ELEMENTS/FUNCTIONS</b>	<b>THEME</b>	<b>MOVES SEQUENCE</b>
Claim	General principle of Tort is explained	M2S1
Illustrate	General principle simplified with a mathematical formula	M2S1(a)
More explanation	Define general principle with an analogy	M2S1(b)

Typically, legal writers will compare and contrast 2 opposing points of view, will show the causes and effects especially on the legal doctrine of negligence provided by Cooke on page 78 along with a simple framework which takes the form of a mathematical formula as seen on Figure 4.

<b>AN ACT + OMISSION + CAUSATION + FAULT + PROTECTED INTEREST + DAMAGE = LIABILITY.</b>
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**Figure 4.1 : A mathematical formula that depicts the legal doctrine of negligence**

#### **4.6.3 DIFFICULTY OF TORT LAW**

From this analysis is the acknowledgement of the difficulty of this particular area of law, namely the law of Tort. This is apparent from :-

- a) Cooke - **M1S2**
- b) Harpwood - **M1S3/ M2S21(b)**
- c) Murphy – **M1S1**
- d) Quinn – **M1S2**

The confusion and difficulty impressed by these authors stemmed from the overlapping of fundamental principles between criminal law and the law of Tort as with between the Contract law and Tort law.

The manner in which the legal writers draft the introduction chapters depends from the base point of deciding, to whom these textbooks are written for i.e. who would be their likely readers. Murphy had from the beginning made known that this textbook was written for law students and forewarned the readers that they may encounter difficulty with the Law of Tort concepts on page 99 of the text represented as **M1S1** and again in **M2S4** which says,

*[The very word tort may pose a conundrum for the novice law student. Crime and contract will be terms with which he is already familiar but what does tort means?].*

Cooke realises that by giving an account of how the Law of Tort operates at this preliminary stage will be overwhelming to law students as observed on page 77 of the text and represented as **M1S2**,

*[This chapter will attempt to explain some of the basic principles which underlie the law of tort .Introductory chapters in textbooks are notoriously difficult for students to understand as they are written by people with a detailed knowledge of the subject for people who are new to it.]*

Harpwood suggests a second reading of the introduction chapter after the readers have finished reading the entire textbook. This seems to suggest the confusion and difficulty of the elements of Tort law. This is stressed in **M2S21(b)**. Further, Murphy even recommended reading this area of law in isolation as represented in **M3S4**.

#### **4.6.3 (a) Interpretation of the difficulty of Tort law**

Dyer (1982:140) mentioned that words play a vital role in influencing the audience, they communicate feelings, association and attitude. Thus in Harpwood, this sentence [*" ..... suggest you reread this introductions again...."*] This is interpreted within systemic functional linguistics as **uncontingent predictions** akin to a general prediction about someone's immediate future. The author presupposes the level of difficulty that intended readers may face at this stage of comprehending the contents in the Introductions and suggest a second read after having had covered the entire textbook.

#### **4.6.4 TEXTUAL COMMUNITIES AND TOPOI OF 'WE'**

White (1984:234) defines communities as constituted by shared conceptions of the world, shared manners and values, shared resources and expectations and procedures for speech and thought. A textual community is the relation between writers and readers. In the textual world of discourse, words according to Dyer (1982:140) play a vital role in influencing the audience, they communicate feelings, association and attitudes. One may notice from reading the texts that some writers seek to engage and communicate with intended readers by using the personal deictics 'we' as seen from Cooke's text and represented as **M2S2** and **M2S12**. This goes back to the Hallidayan's theory of SYSTEMIC-FUNCTIONAL LINGUISTICS (1973) which is based on the premise of semantic-contextual metafunctions as mentioned in Chapter 2 whereby Cooke employs the first person plural "we" to bridge the gap of power disparity on **interpersonal** relation between writer and reader(s). In similar vein, Cooke takes into consideration of his intended readers, being the **tenor** who will more probable than not, be law students or people who has knowledge of the law.

#### 4.6.4(a) Interpretation of the TOPOI of “WE”

From the structural analysis, one may find the 1st person plural noun being stressed on several occasions. Urbanova (1986:110) says that it is common to see the word "we" if several authors are involved. By contrast, again this trend may take shape because the writers want to engage themselves with the intended audience.

#### 4.6.5 TYPIFICATIONS

The researcher finds that there is typification in all text introductions and the order of presentation of legal doctrines and principles preceded by caselaws and statutory provision either from the text itself or on footnotes.

Typifications are rhetorical strategies belonging to legal community of practice in that legal text requires absolute verity to the proposed content. Therefore, one may assert that a legal writer approach in writing is akin to verbatim representation of legal doctrines, legislative provision, judges citations in caselaws and etc.

Below is an account of the common rules of law and issues stressed by these 5 legal writers. The aggregate is derived from the overall consistency of information which possess similar generic annotations and will therefore be placed paralleled with other legal writers and divided by the overall number of legal writers taken for this research multiplied by 100 to come up with the percentage number.

For example, from Table 4.1 on the Definition of Tort, the equations will be as follows:

$$\frac{3 \text{ (nos of writers )}}{5 \text{ nos of writers used for this research}} \times 100\% = 60\%$$

a) **Table 4.4 : Landmark case in the law of Tort**

<b>PREMISE</b>	<b>AUTHORS</b>	<b>MOVES SEQUENCE</b>	<b>PERCENTAGE OF FREQUENCY OF OCCURENCE</b>
RYLANDS V FLETCHER (1968)	Cooke Harpwood Murphy	M2S6 M1S4/ M2S2 / M2S22 M2S14/ M2S21	60.00%

b) **Table 4.5 : Obscurity of legal doctrines**

<b>PREMISE</b>	<b>AUTHORS</b>	<b>MOVES SEQUENCE</b>	<b>PERCENTAGE OF FREQUENCY OF OCCURENCE</b>
Legal doctrines	Cooke Harpwood Murphy Quinn	M2S3 M2S8 M3S2 M1S6	80.00%

c) **Table 4.6 : Claims apart from tortious actions**

<b>PREMISE</b>	<b>AUTHORS</b>	<b>MOVES SEQUENCE</b>	<b>PERCENTAGE OF FREQUENCY OF OCCURENCE</b>
Insurance	Cooke Harpwood Quinn	M2S11 M2S11 M2S1	60.00%

d) **Table 4.7 : Introduction of legal doctrines**

<b>PREMISE</b>	<b>AUTHORS</b>	<b>MOVES SEQUENCE</b>	<b>PERCENTAGE OF FREQUENCY OF OCCURENCE</b>
Law on strict liability	Cooke Harpwood  Murphy Quinn	M2S12 M2S5(a) M2S5(b) M2S19 M2S6(a)	80.00%
Damnum sine injuria  Injuria sine damno	Cooke Murphy Quinn  Cooke	M2S2 M2S18 M1S2(b)  M2S3	80.00%

e) **Table 4.8 : Remedy for damages and compensation culture**

<b>PREMISE</b>	<b>AUTHOR</b>	<b>MOVES SEQUENCE</b>	<b>PERCENTAGE OF FREQUENCY OF OCCURENCE</b>
Compensation	Cooke Harpwood  Murphy Quinn	M2S17 M2S5 M2S5(b) M2S1(a) M1S2(a) M2S2	80.00%
Compensation Culture	Quinn Cooke	M2S4 M2S18(a) M2S18(c)	40.00%

f) **Table 4.9 : Conclusion of the Introductions chapter**

<b>PREMISE</b>	<b>AUTHOR</b>	<b>MOVES SEQUENCE</b>	<b>PERCENTAGE OF FREQUENCY OF OCCURENCE</b>
Summary in bullet point	Cooke Quinn	M3S3 M3S1	40.00%
Reading List	Cooke Quinn	M3S4 M3S2	40.00%

#### 4.6.6 GENERAL HEADINGS

The function of headings, titles, signposts, opening sentences and subheadings is to place emphasis on main important topics essential elements and issues in tort and to hook readers' attention. The text staging of headings may vary according to perceived needs of readership which changes over time as can be seen from the earlier works of Heuston (1998) and the recent text of Cooke, Murphy or Harpwood. The headlines would give cues into the coming subject or issues to be dealt with.

In short, a well thought out headings of a chapter will provide a skeleton statement of an element or elements of law. Accordingly, a fuller narrative account will furnish the details from the skeletal signpost.

#### 4.6.7 THE APPLICATION OF ANALOGIES AND HYPOTHETICAL SITUATIONS

An analogy is in simple terms a reformulation of a problem, thus the function of analogical mapping is to reformulate principles to represent and enhance the doctrine learnt that can be stored in memory and retrieved later and applied if needed.

In summing up, in the light of abstraction of legal concepts, they are concretised with hypothesis, caselaws, legal judgements or from an enabling act. To be specific, from the analysis, one is able to identify legal doctrines that are either analogised, hypothesised or distinguished and a table representation will offer better understanding of the narrowing down of legal concepts.

One must impress upon readers this methodology of distinction between 2 legal concepts derived from philosopher Hegel who expounded the theory of internal contradictions. Therefore, the resolution is through the operation of a *distincto* (i.e to distinguish 2 opposing law) through the argumentations, drawing relevance of the two rules of law. These reconciliation between 2 conflicting legal doctrines can be traced back to 1140 when Gratoin came up with a book entitled *CONCORDIA DISCONDANTIUM CANONUM* where discordant and contradictory texts were harmonised.

**Table 4.10 : How legal doctrines is interpreted and communicated**

<b>PREMISE</b>	<b>AUTHOR</b>	<b>MOVES SEQUENCE</b>	<b>PERCENTAGE OF FREQUENCY OF OCCURENCE</b>
Legal doctrine that is <b>analogised.</b>	Cooke Harpwood	M2S1(a) M2S2(c) M2S5(c)	40.00%
Legal doctrine that is <b>hypothesised.</b>	Harpwood  Quinn	M2S8 M2S9 M2S16(a)  M1S7	40.00%
Legal doctrine that is <b>distinguished</b> with other rule of law.	Harpwood  Quinn  Murphy  Cooke	M2S2  02 caselaw or legal concepts are distinguished between :- - M2S14 and M2S15. - M2S16(b) and M2S17 - M2S19 and M2S20  - M2S6 and M2S6(a)  M2S18  M2S1 M2S1(a) M2S1(b) M2S3	80.00%

#### **4.6.7(a) Interpretation of the application of analogies**

Wenden and Rubin (1987) speak of the rule on analogy in text writing as a general strategy of deductive reasoning. The conventions of using analogy as a form of explanation on a particular legal doctrine in a statutory enactment or a case precedent, understanding is made simple by analogising and hypothesising is an inherent feature in the legal discourse community as seen in Table 4.10.



## **Cross referencing and distinguishing facts**

As with the conventions of using analogies in defining or easifying areas of law, it has been the spirit and tradition of legal discourse community to distinguish 2 strikingly similar caselaw but for a distinct fact in one case would have given a different legal consequences or when 2 laws are distinguished to avoid confusion such as from Cooke :

a) on M2S2 - *Damnum sine injuria* which means the type of caused may not give rise to liability and,

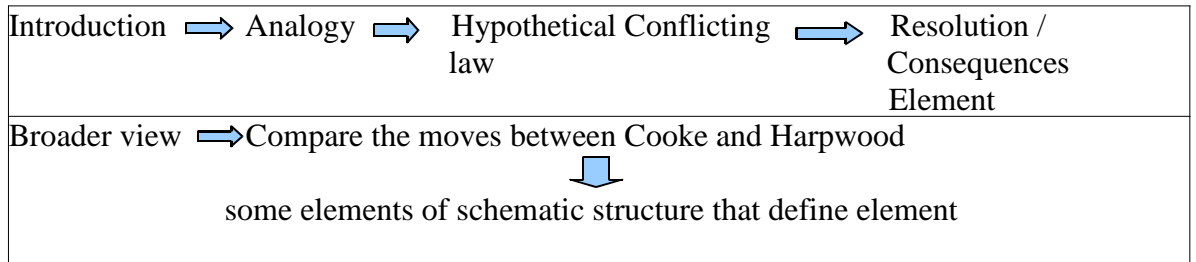
b) on M2S3 - *Injuria sine damno* which means some results in liability even without damage.

### **4.6.8 PREDICTABILITY AND LINEARITY OF TEXT**

If the text has a high predictability it tantamount to having high stylisticity. Each rhetoric has its own appropriate connection between fixity of genres and the fixity of styles i.e. a stable inventory of contexts suggests a stable inventory of style. On the facts, it would seems that in the introduction chapters of the law of Tort, it is essential to know the definition of Tort before one embarks on the subject followed by the overlap of boundaries between tort and other areas of law, delivery of legal doctrine or principles of law preceded by hypothetical situations, analogies and where 2 conflicting legal doctrines is distinguished and harmonised. For example, the aim of Tort is to compensate and not punitive compared to the law of crime which is punitive, in essence to punish for crime committed. Discussions was carried out in Chapter 4 on how legal doctrines were structured.

Legal material writers confine themselves to the logic of linearity according to legal principles and legal doctrines. Thus, a linear description of the schemata structure of this text is stratified in a linear sequence.

**Table 4.11 : A linear description of the text structure by the researcher can be exemplified as :**



One may possibly say that C-B-S style in writing expounded by Scollon and Scollon best suits the nature of this research which entails :-

- a) Clarity - of facts as being accurate and precise.
- b) Brevity - the use of exact information. This doctrine is so relevant when it comes to legal writing where the contents contain predominantly authentic articles on legal provisions, case precedents, law reviews and legal judgements. Therefore, one may concur that the legal stylistics of writing is direct,
- c) Sincerity - thereto the motivation behind the writing derived from the objectivity and reliability in the exposition of facts and events.

#### **4.6.9 GENERIC EXPECTATIONS**

As seen from the 5 texts analysed, one would surmise that there is no one formulaic approach to legal text writing. By the same token it is fair to say there is no one right way to organise, analyse or write the text. Having said that, it is commonsensical to one that competent legal writers would have similar thought thinking patterns in framing the essential elements and principles of the law of tort into the middle part of the text. In a similar vein, this account for other writers of other discipline too. In addition, Fowler (1989:215) supports this view by asserting that this generic expectations from writers on their intended readers as having a shared code.

The only grey area of understanding from these 5 texts analysis is the placement of the comparison between the law of Tort and different areas of laws. One can observe

from Table 4.1 that :

- 1) author Quinn talks about it at the initial stage of chapter and,
- 2) Cooke and Harpwood in the middle part of the chapter and,
- 3) Murphy would explain on the differences at the concluding part of the chapter.

The disparity between these authors' choices of introducing the subject matter seems to heighten the researcher's curiosity and comes to a conclusion that :

1) Quinn speaks of the differences at the beginning stage assuming that readers belong to the same community of practice or law discipline and thus are competent in comprehending at the initial stage itself. Having said that, it is fair to say the comparison of other common laws and law of Tort would not overwhelm or confuse a competent reader as other areas of law being compared such as the Contract law or Criminal law and the law of Tort itself were part of the core subjects that were being taught at the same academic level of the law undergrad studies. Therefore, the readers would have an idea of the basic differences between these laws.

2) All 4 other legal writers delayed the branching of the comparative elements of common law so as to not overwhelm and weigh down the readers but to slowly feed the readers as the understanding of Tort law progresses and the knowledge deepens.

As with transactional genre , **legal genre** the majority of elements are fixed in their order of occurrence.

#### **4.6.10 THE FUNCTION OF FOOTNOTES**

There seems to be an advantage in keeping the traditions of using footnotes which dates back to the eighteen century. To some authors , supporting legal authority is defined immediately and some would place references, rebuttal or conflicting caselaws and law reports in footnotes. The function of footnotes is ancillary to the main text.

This approach seems to easify a reader to have a better grasp of the law without illustrating them in Tort in text to reduce information loading or overwhelm the readers and primarily aimed at decluttering the text.

#### 4.6.11 INTERTEXTUALITY

Devitt ( 1991) speaks of intertextuality with other text. This has happened countless times in law where a doctrine of law is supported with legal authority be it case precedents or a statutory provision which gives cognisance to the justification of preserving order and justice in the society.

In the legal world, intertextual referencing is nothing new to this community of practice, any proposition in law is justified by some legal enactments or relevant binding precedents. How legal judgements is derived, stems from evidence of facts supported by reference to earlier precedents (which is known as the doctrine of stare decisis which means the doctrine according to which previous judicial decisions must be followed) or an enabling act of parliament.

#### 4.7 CONCLUSION

The regularity of patterns derived from the analysis is not as compelling as the phenomenon of how the **STEPS** which identified the elements, fell within a narrow margin to each other. In other words it is somewhat astonishing to realise the order of delivery of elements be it a topic/ an issue or a legal doctrine from a legal author occurs at or about the same time as other legal authors. This is evident on many area of law such as:

- a) From Cooke ---- Insurance Policy ---- M2S11  
Harpwood ----- M2S11
- b) From Cooke --- Law on trespass ----- M2S6  
Heuston ----- M2S6
- c) From Cooke ---- Objective of Tort ---- M2S17  
Murphy -----M2S17
- d) From Murphy -- Law on privacy -----M2S9  
Harpwood -----M2S10 (b)

- e) From Harpwood - Case precedent - Donoghue v Stevenson - M2S16 (b)  
Murphy ----- M2S14
  
- f) From Harpwood - Case precedent - Rylands v Fletcher ----- M2S22 (c)  
Murphy ----- M2S21