

**American University Washington College of Law**

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November, 2011

# Teaching Rule Synthesis with Real Cases

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# Teaching Rule Synthesis with Real Cases

Paul Figley

Rule synthesis is the process of integrating a rule or principle from several cases.<sup>1</sup> It is a skill attorneys and judges use on a daily basis to formulate effective arguments, develop jurisprudence, and anticipate future problems.<sup>2</sup> Teaching new law students how to synthesize rules is a critical component in training them to think like lawyers.<sup>3</sup>

While rule synthesis is normally taught in legal writing classes, it has application throughout the law school experience. Academic support programs may teach it to students even before their first official law school class.<sup>4</sup> Many professors convey analytical lawyering skills, including rule synthesis, in their

1. Richard K. Neumann, Jr. & Sheila Simon, *Legal Writing* 55 (Aspen 2008) (“*Synthesis* is the binding together of several opinions into a whole that stands for a rule or an expression of policy.”).
2. Jane Kent Gionfriddo, *Thinking Like A Lawyer: The Heuristics of Case Synthesis*, 40 *Tex. Tech L. Rev.* 1, 7 (2007). On a more pedestrian level, good litigators develop the facility to read the cases cited by an opponent in support of its proposed rule, and synthesize from them a different, more credible rule that undermines the opponent’s case.
3. *See id.* at 7; *see also* Kurt M. Saunders & Linda Levine, *Learning to Think Like A Lawyer*, 29 *U.S.F. L. Rev.* 121, 125 (1994).
4. *See* Sonia Bychkov Green, Maureen Straub Kordesh & Julie M. Spanbauer, *Sailing Against the Wind: How A Pre-Admission Program Can Prepare at-Risk Students for Success in the Journey Through Law School and Beyond*, 39 *U. Mem. L. Rev.* 307, 328 (2009); Mark Graham & Bryan Adamson, *Law Students’ Undergraduate Major: Implications for Law School Academic Support Programs (ASPs)*, 69 *UMKC L. Rev.* 533, 541-42 (2001).

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doctrinal courses.<sup>5</sup> Rule synthesis has obvious utility for clinicians and others who supervise interns.<sup>6</sup> Mastering synthesis skills can help students integrate doctrinal material and succeed on law school exams.<sup>7</sup>

Many students new to the law have a difficult time grasping how to do rule synthesis.<sup>8</sup> To avoid the process, some pick one promising quotation from a group of cases and declare it to be their rule of law. Others may serially discuss all the cases on an issue and compare each with the facts of the matter at hand,<sup>9</sup> in effect, doing a mini-IRAC analysis for each cited case.<sup>10</sup> Neither approach is adequate. Students must learn to read a body of law and integrate their understanding of it into one simply stated, readily applied rule.

This article suggests how rule synthesis might be taught in one classroom session using real cases. It advocates a three-part approach. First, explain the nature of rule synthesis to the students. Second, do a whimsical exercise with them to show how rule synthesis works. Finally, break into small groups and synthesize a rule from real cases for a hypothetical problem. Massachusetts judges have written a number of very short opinions regarding banana peel litigation. Accordingly, the hypothetical problem suggested involves a banana peel slip-and-fall case set in Boston. Because these opinions are so short, students will have time in class to read them and synthesize a rule from them. In working through the exercise students will see that different rules can be synthesized from the same set of cases.

### **1. Principles of Rule Synthesis**

Any structured legal argument needs a rule to apply to the facts of the situation. If an attorney is faced with a single statute that sets forth the rule of law, the attorney can simply quote the relevant portion of the statute as the rule applicable to the issue at hand, the R portion of the CREAC paradigm.<sup>11</sup> The

5. See Nelson P. Miller & Bradley J. Charles, Meeting the Carnegie Report's Challenge to Make Legal Analysis Explicit—Subsidiary Skills to the IRAC Framework, 59 J. Legal Educ. 192, 198–99 (2009); Andrea A. Curcio, Gregory Todd Jones & Tanya M. Washington, Does Practice Make Perfect? An Empirical Examination of the Impact of Practice Essays on Essay Exam Performance, 35 Fla. St. U. L. Rev. 271, 313 (2008); Susan E. Provenzano & Lesley S. Kagan, Teaching in Reverse: A Positive Approach to Analytical Errors in 1L Writing, 39 Loy. U. Chi. L.J. 123, 161–162 (2007).
6. See Bernadette T. Feeley, Training Field Supervisors to Be Efficient and Effective Critics of Student Writing, 15 Clinical L. Rev. 211, 224–225 (2009).
7. Adam G. Todd, Exam Writing As Legal Writing: Teaching and Critiquing Law School Examination Discourse, 76 Temp. L. Rev. 69, 87 (2003).
8. See Provenzano & Kagan, *supra* note 5, at 164.
9. See generally *id.*
10. Students need to master Rule Synthesis whether the analytical structure they are learning is IRAC (Issue, Rule, Application, Conclusion), CREAC (Context-Conclusion, Rule, Explanation, Application, Conclusion), TREAT (Thesis, Rule, Explanation, Application, Thesis), CRuPAC (Context, Rule, Proof, Application, Conclusion), or something else.
11. Our program uses CREAC and this article will use it as a sample analytical structure.

same approach can be used if a single controlling case is directly on point and dictates the outcome of the problem. Stating the rule is not typically that easy. If it derives from a statute, cases may have interpreted the statutory language, adding to or changing the rule. Frequently, a number of cases will have dealt with the same issue. Each case may state and apply the rule just as previous cases had. Alternatively, cases may state the rule differently, apply it differently, seem to say something entirely different, or overrule prior decisions implicitly or explicitly. These latter situations require rule synthesis.

Students should not analyze an issue by doing a case-by-case comparison of the situation at hand with the cases on point.<sup>12</sup> That kind of presentation is unsynthesized, and forces the reader to do what she expected the lawyer to have done for her, which was to read and analyze a set of cases and to present her with an explanation of how they tie together. To do this—to synthesize a rule—the attorney must examine the authorities that have applied a body of law in actual situations, derive from those applications the key principles of interpretation, and state those principles as a rule.

A rule should meet three criteria. First, it should be simply stated—concise enough for the reader to grasp easily. Second, it should be readily applied—unambiguous because the terms have defined, non-circular meanings,<sup>13</sup> specific enough to give guidance for a new set of facts, but not too narrow to be useful. Third, it should be consistent with the cases and law in the jurisdiction—if applied to the existing cases, the rule would accurately predict the outcome of each.<sup>14</sup> Students should remember that they synthesize rules

12. A typical case-by-case analysis might go like this:

*Summers v. Tice*, 199 P.2d 1 (Cal. 1948), requires that when one of two negligent tortfeasors caused an injury, the burden is on each of them to show that the injury was not caused by his act. Applying that rule here, unless defendant can show that his car did not strike plaintiff's decedent, which he cannot do given these facts, he is liable.

In a case involving two fires that merged into one, the Supreme Court of Minnesota held that when two causes combine to cause damage, and either alone would have caused that damage, the source of each cause is liable for the damage. *Anderson v. Minneapolis, St. P. & S. St. M. R.R. Co.*, 179 N.W. 45 (Minn. 1923). Applying that rule, defendant is liable because his car alone could have caused plaintiff's decedent's death.

13. A rule that “the court shall do justice” does not provide a meaningful basis for predicting what will happen in the client's case. Nor is it helpful to the reader to define “reasonable care” as “care that is reasonable or sensible.”
14. These criteria for good rules were suggested by Dan Weddle, director of academic support and clinical professor, University of Missouri-Kansas City School of Law, at the 2007 Central States Regional Legal Writing Conference. These criteria reflect the problems beginning legal writers actually encounter when they approach rule synthesis. Professors Provenzano and Kagan studied 265 closed-universe, fall semester memoranda written by their 1L students over four years. Provenzano & Kagan, *supra* note 5, at 149, 151. They found:

[T]he students struggled to articulate rules from the case law that govern and define

in the first place in order to predict the outcome of a legal problem they have been asked to address. They will be better able to make predictions if the rules they synthesize are easily understood, readily applied, and consistent with the pertinent authorities.

## 2. Crabby Mrs. McGinty's Garden Hose

With a basic understanding of the goals of rule synthesis, students can address a whimsical problem and apply their developing skills. One such problem involves crabby Mrs. McGinty and her garden hose.<sup>15</sup> The goal is to predict from past practices when Mrs. McGinty will turn her hose on visitors. Mrs. McGinty's prior garden hose decisions could be passed out to the class or presented in PowerPoint. After reading each scenario the students should be able to formulate a statement of Mrs. McGinty's holding in that instance. Once they have absorbed all the holdings they should synthesize a general rule for Mrs. McGinty's practice that is simply stated, readily applied, and consistent with all her prior actions. After they have synthesized their rule, they should be ready to predict what Mrs. McGinty will do in new situations by applying their rule to new facts. Students generally enjoy this exercise.

### *Mrs. McGinty's Garden Hose Practices*

On **Sunday**, two neighborhood boys, Cletis Culpeper and Tucker Carlton, Jr., sneaked onto Mrs. McGinty's property to taunt Mrs. McGinty's dog Houndie with sticks. Mrs. McGinty came off the porch and doused the boys with water from the garden hose, yelling, "You varmints get off my lawn a-fore I shoot you dead!" The boys ran away.

**Rule:** Uninvited people teasing the dog get hosed.

On **Monday**, Parson Skeeter nodded to Mrs. McGinty from the sidewalk, and Mrs. McGinty waved him over, calling, "Parson Skeeter, come out of the sun for a spell and have some lemonade with me on the porch." Parson Skeeter ambled up the driveway past the "Keep Out" signs and sat a spell with Mrs. McGinty, nodding repeatedly as Mrs. McGinty regaled him with details of her battle with scabies.

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a legal element. Specifically, 19.25[percent] of our students struggled to state a clear and concrete rule of law that would be comprehensible to the unfamiliar reader. Another 32.83[percent] of our students struggled to develop a rule section without stating repetitive rules that were circular or that merely repeated the first rule in different words. Lastly, 34.34[percent] of our students stated rules of law that were too narrow, representing an incomplete synthesis of the case law.

*Id.* at 152.

15. I was introduced to this problem by Christy DeSanctis, director of legal research and writing at the George Washington University School of Law.

**Rule:** Invited people do not get hosed.

On **Tuesday**, Trixie Pepper wandered onto Mrs. McGinty's property to pick honeysuckles for a bonnet she was making. Mrs. McGinty sprang from behind the bushes with the garden hose, spraying Trixie and ruining her new home perm. Mrs. McGinty shouted, "Trixie Pepper, you brazen jezebel, you better get off my lawn a-fore I shoot you dead!" Trixie high-tailed it off Mrs. McGinty's property in a flash, sobbing the whole way.

**Rule:** Uninvited people taking flowers get hosed.

On **Wednesday**, Hooterville had its annual Founders Parade. Billy Joe Sandpiper was dressed as Abe Lincoln in a top hat and was walking down the street on stilts when suddenly a pig escaped from one of the 4-H cages, knocking Billy Joe over and onto Mrs. McGinty's property. Having seen the incident, Mrs. McGinty came over, dusted Billy Joe off and offered him some lemonade.

**Rule:** Uninvited people in a civic celebration who are forced onto property through no act of their own do not get hosed and do get lemonade.

On **Thursday**, Cletis Culpeper was being chased by a swarm of hornets, so he ran onto Mrs. McGinty's property and dove into the pond in the backyard. Mrs. McGinty saw the whole incident and laughed so hard, she fell clear off her rocking chair. She didn't bother with the garden hose or the shotgun.

**Rule:** Uninvited people who come onto the property to avoid physical injury do not get hosed.

On **Friday**, Tucker Carlton, Jr. was chased onto Mrs. McGinty's property by Trixie Pepper, who was wielding a cricket bat and threatening to bash Tucker's head in for using her best dress to keep his prize-winning piglets warm. In running from Trixie, Tucker trampled Mrs. McGinty's patch of cucumbers (which she intended to sell at the county fair) and damaged the gate to Mrs. McGinty's chicken coop. Mrs. McGinty did not spray Tucker with water, given the ferocity of Trixie's swats with the cricket bat, but she immediately called his parents and demanded that they reimburse her for the damaged cucumbers and chicken coop.

**Rule:** Uninvited people who come onto the property to avoid physical injury do not get hosed but will be held responsible for any damage they cause.

Rules derived from each episode:

**Sunday Rule:** Uninvited people teasing the dog get hosed.

**Monday Rule:** Invited people do not get hosed.

**Tuesday Rule:** Uninvited people taking flowers get hosed.

**Wednesday Rule:** Uninvited people in civic celebrations who are forced onto the property through no act of their own do not get hosed and do get lemonade.

**Thursday Rule:** Uninvited people who come onto the property to avoid physical injury do not get hosed.

**Friday Rule:** Uninvited people who come onto the property to avoid physical injury do not get hosed but will be held responsible for any damage they cause.

From Mrs. McGinty's prior hosing decisions the students can synthesize a formula (rule) for predicting Mrs. McGinty's behavior in future cases. The prior hosing decisions collectively might be synthesized into this rule:

A person who voluntarily enters Mrs. McGinty's property without permission will be hosed, regardless of the reason for entering onto the property, unless entry is necessary to avoid physical danger, in which case the person is liable for actual damage to the property.

This rule could be set forth in outline form. A person will be hosed if the person:

- voluntarily
- enters Mrs. McGinty's property
- without permission.

Exception:

- if a person enters the property to avoid physical danger
- that person will not be hosed;
- but that person is liable for actual damage caused.

This rule is easily understood, readily applied, and consistent with Mrs. McGinty's prior actions.

At this point the students are ready to apply their rule to new scenarios—the application part of their analytical structure.<sup>16</sup> The instructor should highlight that the students will apply their synthesized rule to the facts of the client's case to reach a conclusion. Given the rule they have synthesized for Mrs. McGinty, the students can predict what would happen in new situations:

Holly Golightly tiptoes quickly into Mrs. McGinty's garden to pick a tomato.

A kid on a bike in the Sunflower Parade loses control and crashes onto the property.

16. It is the A in the CREAC, IRAC, TREAT, or CRuPAC methodology.

A parade watcher intentionally jumps over the fence and onto the property to get out of the kid's way, squashing four of Mrs. McGinty's squash.

They will readily see that Holly voluntarily entered the property without permission and will be hosed. They will correctly predict no hosing for the child who lost control of his bike and did not enter the property voluntarily. Likewise, they will calculate that the parade watcher who jumped the fence to avoid injury falls within the exception and would not be hosed, but would be liable for any resulting damages.<sup>17</sup>

### 3. Massachusetts Banana Peel Slip-and-Fall Cases

The students should now be ready to work in small groups on rule synthesis using real cases. To help focus their analysis, students can use a fact situation involving a banana peel slip-and-fall case in Massachusetts:

Sandy Banks was excited to visit the historic sites of Boston. Upon arriving in the city Sandy went immediately to Faneuil Hall, even though it was 4:30 in the morning. Sandy went to the main entrance, saw that the shops were closed, but wandered around the building, gazing and pondering the meaning of history. Sandy then slipped and fell. Although in great pain, Sandy looked around and spotted a brown, leathery banana peel, six inches in length, lying on the gray, slate floor.

Custodians employed by Faneuil Hall are responsible for sweeping up every night after the businesses close at 9:00 p.m. (6:00 p.m. on Sundays).

The students should then be asked whether Sandy will be able to recover damages from Faneuil Hall. They should recognize that they do not know the answer.

Four Massachusetts banana peel slip-and-fall cases provide a good vehicle for this classroom exercise because they are very short and readily understood.<sup>18</sup> These cases are typical of food on the floor cases. As a general matter, someone in control of a premise has a tort duty to keep the floor reasonably clear of hazards. Negligence will be found if the defendant unreasonably fails to clean a hazard off its floor and someone slips on that hazard, falls and is injured. On the other hand, there will be no negligence if a plaintiff slips on a hazard that the defendant exercising reasonable care did not know was there. In these

17. Mrs. McGinty and her garden hose might be revisited when the students turn to advocacy, using scenarios that play around the edges of the rule. For example, if "the mailman comes on the property with the mail," there is a fair question whether he had implied permission to do so. Alternatively, if "Mrs. Skeeter leaves a TupperWare party thrown by Mrs. McGinty and picks a petunia on her way off the property," Mrs. Skeeter certainly had permission to enter the property, but whether she exceeded that permission when she picked the flower may be debated.

18. These four opinions are just a sampling of Massachusetts slip-and-fall law.

Massachusetts cases there was no direct evidence (eyewitnesses, photographs, etc.) that the defendant had breached its duty to keep its premises safe. The issue in each was whether the plaintiff had presented enough circumstantial evidence to support the conclusion that the defendant had sufficient notice of the hazard (the presence of a banana peel) so that it could have removed that hazard but negligently failed to do so.

The four banana peel cases should be presented one at a time to students, using print versions of the cases. The West headnotes for these cases form an important part of this exercise, and the headnotes in Westlaw's electronic versions are not identical to the print versions.<sup>19</sup> Because the cases contain unexpected twists it is important for the instructor to read them carefully before class.

*A. Goddard v. Boston & Maine Railroad Company.*<sup>20</sup>

GODDARD  
v.  
BOSTON & M. R. CO.

(Supreme Judicial Court of Massachusetts, Suffolk May 22, 1901.)

CARRIERS - INJURY TO PASSENGER

Where a passenger alighting from train slips on a banana skin, and there is no evidence as to length of time it had been on platform, he is not entitled to recover.

Exceptions from superior court, Suffolk county.

Action by Wilfred H. Goddard against the Boston & Maine Railroad Company for personal injuries received by falling upon a banana skin lying upon the platform at defendant's station at Boston. The evidence showed that defendant was a passenger who had just arrived, and was about the length of the car from where he alighted when he slipped and fell. There was evidence that there were many passengers on the platform. Verdict directed for defendant, and plaintiff excepts. Exceptions overruled.

John E. Crowley, for plaintiff. Walter I. Badger and Sanford Robinson, for defendant.

19. The opinions set forth in the text of this article contain the language of the print versions of the cases. Because the West headnotes are part of the exercise, only the West versions of the cases are used.

20. 60 N.E. 486 (Mass. 1901).

HOLMES, C. J. The banana skin upon which the plaintiff stepped and which caused him to slip may have been dropped within a minute by one of the persons who was leaving the train. It is unnecessary to go further to decide the case.

Exceptions overruled.

Here, Justice Holmes held that there could be no liability because the banana peel may have been dropped by a passenger who had just arrived.<sup>21</sup> The students might derive this holding (rule) from the case:

Rule 1A: A jury may not infer that a defendant was negligent for failing to remove a banana peel if a “just arrived” passenger may have dropped it.

Once they have finished, one group can report its rule to the entire class. Other students can then comment on it.

*B. Anjou v. Boston Elevated Railway Company.*<sup>22</sup>

ANJOU  
v.  
BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, Suffolk. March 3, 1911.)

Carriers (§ 318\*)—Injury to Passengers—Slipping on Station Platform—Negligence—Evidence

Testimony in an action for injury to a passenger on an elevated railroad, by slipping on a banana peel on the carrier’s platform, describing the peel in the following terms: “It felt dry, gritty, as if there were dirt on it,” as if “trampled over a good deal,” as “flattened down, and black in color,” “every bit of it was black, there wasn’t a particle of yellow,” and as “black, flattened out, and gritty,” authorized an inference that it had not been dropped a moment before by a passenger, and consequently furnished evidence of negligence of the carrier’s employee at the station, whose duty included the observing and removing of anything on the platform interfering with the safety of passengers.

Report from Superior Court, Suffolk County; John F. Brown, Judge.

Action by Helen G. Anjou against the Boston Elevated Railway Company. Verdict was directed for defendant, and the case reported. Judgment for plaintiff.

21. *Id.*

22. 94 N.E. 386 (Mass. 1911).

J. J. Cummings and H. J. Dixon, for plaintiff. John E. Hannigan, for defendant.

RUGG, J. The plaintiff arrived on one of defendant's cars on the upper level of the Dudley Street terminal; other passengers arrived on same car, but it does not appear how many. She waited until the crowd had left the platform, when she inquired of one of defendant's uniformed employees the direction to another car. He walked along a narrow platform, and she, following a few feet behind him toward the stairway he had indicated, was injured by slipping upon a banana peel. It was described by several who examined it in these terms: It 'felt dry, gritty, as if there were dirt upon it,' as if 'trampled over a good deal,' as 'flattened down, and black in color,' 'every bit of it was black, there wasn't a particle of yellow,' and as 'black, flattened out and gritty.' It was one of the duties of employees of the defendant, of whom there was one at this station all the time, to observe and remove whatever was upon the platform to interfere with the safety of travelers. These might have been found to be the facts.

The inference might have been drawn from the appearance and condition of the banana peel that it had been upon the platform a considerable period of time, in such position that it would have been seen and removed by the employees of the defendant if they had been reasonably careful in performing their duty. Therefore there is something on which to base a conclusion that it was not dropped a moment before by a passenger, and *Goddard v. Boston & Maine R. R.*, 179 Mass. 52, 60 N. E. 486, and *Lyons v. Boston Elevated Railway Co.*, 204 Mass. 227, 90 N. E. 419, are plainly distinguishable. The obligation rested upon the defendant to keep its station reasonably safe for its passengers. It might have been found that the platform was suffered to remain in such condition as to be a menace to those rightfully walking upon it. Hence there was evidence of negligence on the part of the defendant, which should have been submitted to the jury. *MacLaren v. Boston Elevated Railway Co.*, 197 Mass. 490, 83 N. E. 1088; *Foster v. Old Colony St. Rly. Co.*, 182 Mass. 378, 65 N. E. 795; *Rosen v. Boston*, 187 Mass. 245, 72 N. E. 992, 68 L. R. A. 153; *Kingston v. Boston Elevated Rly. Co.*, 93 N. E. 573.

In accordance with the terms of the report, let the entry be:

Judgment for the plaintiff for \$1,250 with costs.

In *Anjou* the court issued a judgment against the railway when a woman slipped on a "dry, gritty" banana peel, "black in color" because the jury could have inferred that "it had been on the platform a considerable period of time."<sup>23</sup> The students might derive this holding (rule).

23. *Id.*

Rule 1B: A jury may infer that a defendant was negligent for failing to remove a banana peel if its appearance and condition suggest it had been on the floor for a considerable period of time.

Again, the entire class can discuss one group's rule.

*C. Mascary v. Boston Elevated Railway Company.*<sup>24</sup>

MASCARY  
v.  
BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, Suffolk. March 4, 1927.)

Carriers [key] 318(2)—Showing only that plaintiff slipped on banana peel on defendant's public stairway held insufficient to support recovery for injuries.

Evidence showing only that plaintiff slipped and fell on banana peeling on stairway owned by defendant, and open to public, held insufficient to support recovery, absent any showing of defendant's negligence.

Report from Superior Court, Suffolk County; E. T. Broadhurst, Judge.

Action by Josephine Mascary against the Boston Elevated Railway Company. On report after verdict for plaintiff. Judgment for defendant.

E. Masters, of Boston, for plaintiff.

S. P. Sears, of Boston, and E. K. Nash, of Weston, for defendant.

RUGG, C. J. There was evidence tending to show, in its aspect most favorable to the plaintiff, that while descending a flight of stairs leading to the Central Square Station of the defendant she slipped and fell, and immediately thereafter a piece of banana peel was found underneath her shoe; that her husband, going forthwith to the place where she fell, found there a part of a banana skin, dark or 'black as tar,' and dry, 'a little dry skin, very black,' and 'it was smoothed down, \* \* \* soft \* \* \* as if something had been pressed on it.' The defendant owned and controlled the stairway and it was open to the public.

There was no evidence of negligence on the part of the defendant. The banana skin may have been dropped a moment before by a stranger to the defendant, or have come upon the stair without fault of the defendant. The case is governed by numerous decisions. *Goddard v. Boston & M. R. Co.*, 179

24. 155 N.E. 637 (Mass. 1927).

Mass. 52, 60 N. E. 486; *Pearson v. Director General of Railroads*, 245 Mass. 158, 162, 163, 139 N. E. 488; *O'Neil v. Boston Elevated Railway*, 248 Mass. 362, 142 N. E. 904, and cases there collected; *Sweatland v. Springfield Public Market*, 247 Mass. 268, 142 N. E. 46; *Towne v. Waltham Watch Co.*, 247 Mass. 390, 393, 141 N. E. 675; *O'Brien v. Boston Elevated Railway*, 250 Mass. 192, 145 N. E. 259; *O'Leary v. Smith*, 255 Mass. 121, 150 N. E. 878. Additional factors tending to show negligence of the defendant present in *Anjou v. Boston Elevated Railway*, 208 Mass. 273, 94 N. E. 386, 21 Ann. Cas. 1143, distinguish that case from the case at bar.

The motion of the defendant for a directed verdict in its favor ought to have been granted. In accordance with the terms of the report, the entry may be

Judgment for defendant.

Here, a woman slipped on a “black as tar,” “smoothed down,” “soft” banana peel on a stairway.<sup>25</sup> Despite a jury verdict for the plaintiff, judgment was entered for the defendant.<sup>26</sup> The court reasoned, “There was no evidence of negligence on the part of the defendant. The banana skin may have been dropped a moment before by a stranger to the defendant, or have come upon the stair without fault of the defendant.”<sup>27</sup>

This result seems surprising and apparently at odds with the rule derived from *Anjou*. It is unlikely that the quandary arose from *Mascary* misinterpreting *Anjou*; Justice Rugg wrote both opinions. He evidently thought the decisions were consistent, explaining that “[a]dditional factors tending to show negligence of the defendant present in *Anjou*...distinguish that case from the case at bar.”<sup>28</sup> Perhaps some confusion arose from the *Anjou* headnote which stated that the banana peel’s “‘black, flattened out, and gritty,’ [condition] authorized an inference that it had not been dropped a moment before by a passenger, and consequently furnished evidence of negligence....”<sup>29</sup> Of course, a headnote or syllabus published with an opinion is not precedent, a lesson our students should learn early in their careers.<sup>30</sup>

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Anjou v. Boston Elevated Ry. Co.*, 94 N.E. 386 (Mass. 1911).

30. As the Supreme Court explained in *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337 (1906):

[T]he headnote is not the work of the court, nor does it state its decision, though a different rule, it is true, is prescribed by statute in some states. It is simply the work of the reporter, gives his understanding of the decision, and is prepared for the convenience of the profession in the examination of the reports.

Obviously the *Mascary* court saw more in *Anjou* than was included in our Rule 1B. Upon re-reading *Anjou*, the students will note (with guidance) its statement that:

[Ms. Anjou] waited until the crowd had left the platform, when she inquired of one of defendant's uniformed employees the direction to another car. He walked along a narrow platform, and she, following a few feet behind him toward the stairway he had indicated, was injured by slipping upon a banana peel....It was one of the duties of employees of the defendant, of whom there was one at this station all the time, to observe and remove whatever was upon the platform to interfere with the safety of travelers.<sup>31</sup>

Because the actions and duties of the employee are the only facts in the *Anjou* opinion other than the plaintiff's actions and the condition and location of the banana peel, they likely are the "[a]dditional factors tending to show negligence of the defendant present in *Anjou*," noted in *Mascary*.<sup>32</sup> With this information and the outcome in *Mascary*, the students might derive this holding (rule).

Rule 1C: A jury may infer that a defendant was negligent for failing to remove a banana peel if its appearance and condition suggest it had been on the floor for a considerable period of time,

**and** an employee of the defendant was present

[**and/or**, guided plaintiff to the hazard]

[**and/or**, was assigned the duty to observe and remove hazards].

*D. Scaccia v. Boston Elevated Railway Company*.<sup>33</sup>

SCACCIA

v.

BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, Suffolk. Nov. 8, 1944.)

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14. Carriers [key] 318(1)

31. 94 N.E. at 386.

32. 155 N.E. at 637.

33. 57 N.E.2d 761 (Mass. 1944). The Scaccia opinion is much longer than the others, though only a brief segment pertains to the slip and fall issues. The other portions of the opinion and the headnotes pertaining to those portions have been excerpted. They should also be excerpted or marked out in copies of the opinion given to students.

Where passenger boarded motor bus at terminus of line, where bus had remained without passengers for at least a minute or two, when there was a banana peel, four inches long, black, pressed down, covered with sand and gravel, and dry, on floor in aisle, on which passenger slipped on leaving bus nine minutes later, evidence warranted finding that peel had remained on floor so long that in exercise of due care operator of bus should have discovered and removed it, rendering operator liable for passenger's injuries.

15. Damages [key] 130(1)

\$750 was awarded bus passenger for injuries sustained in slipping on a banana peel on the floor of a motor bus.

On report from Superior Court, Suffolk County; Williams, Judge.

Action by Constance Scaccia against the Boston Elevated Railway Company for personal injuries resulting from slipping on a banana peel on floor of defendant's motor bus, tried before a judge of the Superior Court, sitting without a jury on an "agreed statement of facts" submitted as evidence, from which the judge and the Supreme Judicial Court might draw inferences of fact. The judge denied plaintiff's request for a ruling that the evidence warranted a finding for plaintiff, found for the defendant, and reported case for determination of the correctness of his ruling.

Judgment entered for plaintiff.

See, also, 56 N.E.2d 465.

Before FIELD, C. J., and LUMMUS, DOLAN, and RONAN, JJ.

E. J. Donlan, of Boston, for plaintiff.

S. P. Scars, of Boston, for defendant.

LUMMUS, Justice.

After the decision in *Scaccia v. Boston Elevated Ry.*, 308 Mass. 310, 32 N.E.2d 253, this action of tort for personal injuries, resulting from slipping on a banana peel which was on the floor of a motor bus operated by the defendant in which the plaintiff was a passenger, was tried before a judge of the Superior Court, sitting without jury, upon an 'agreed statement of facts' submitted as evidence, from which the judge could draw inferences of fact.

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[14] We now come to the merits of the ruling. When the plaintiff boarded the defendant's motor bus at Cleary Square in the Hyde Park section of Boston at noon on October 2, 1934, it could have been found that there was on the floor in the aisle, near the front of the bus, a banana \*252 peel 'four inches long, all black, all pressed down, dirty, covered with sand and gravel, dry and gritty looking.' When the plaintiff left the bus nine minutes later, she slipped and fell on the banana peel, which remained in the same position. Only three passengers were in the bus during the trip. It could have been found that Cleary Square was one terminus of the line, and that the bus remained there without passengers in it for 'a minute or two' at least. The bus was operated by one man.

The question is whether the foregoing basic facts warrant an inference of negligence on the part of the defendant or its operator. No one would be likely to enter the bus except servants of the defendant and passengers. In the ordinary course of events, no passenger would carry into the bus a banana peel, or a banana, in the condition shown by the agreed facts. Such a condition naturally would result from lying a considerable time on the floor. We think that it could be found that the peel had remained on the floor of the bus so long that in the exercise of due care the defendant should have discovered and removed it. *Anjou v. Boston Elevated R. Co.*, 208 Mass. 273, 94 N.E. 386, 21 Ann.Cas. 1143. See also *Foley v. F. W. Woolworth Co.*, 293 Mass. 232, 199 N.E. 739.

A number of cases in which the unexplained presence on floors or stairs of discarded parts of fruit was held insufficient evidence of negligence may be distinguished. In *Goddard v. Boston & M. R. R.*, 179 Mass. 52, 60 N.E. 486, the banana peel did not appear to be other than fresh. In *Mascary v. Boston Elevated R. Co.*, 258 Mass. 524, 155 N.E. 637, where a banana peel was much like that described in the *Anjou* case, it lay on stairs leading from the street, and might \*\*766 have been recently thrown there by a child in play. In *McBreen v. Collins*, 284 Mass. 253, 187 N.E. 591, and *Newell v. Wm. Filene's Sons Co.*, 296 Mass. 489, 6 N.E.2d 820, the plaintiff fell on a lemon or orange peel that showed no marks of age comparable to those in the present case. In other cases the cause of the injury was an apple core or other fruit which would become discolored sooner than a banana peel would become in the condition described in the evidence in the present case. *O'Neill v. Boston Elevated R. Co.*, 248 Mass. 362, 142 N.E. 904; \*253 *Sisson v. Boston Elevated R. Co.*, 277 Mass. 431, 178 N.E. 733; *Renzi v. Boston Elevated R. Co.*, 293 Mass. 228, 199 N.E. 738.

[15] In accordance with the terms of the report, judgment is to be entered for the plaintiff as upon a finding for \$750.

So ordered.

In *Scaccia*, a passenger boarded a bus at its terminus, rode for nine minutes, and then slipped on a banana peel near the front of the bus while departing.<sup>34</sup> The banana peel was “four inches long, all black, all pressed down, dirty, covered with sand and gravel, dry and gritty looking.”<sup>35</sup> At the terminus, the bus had stopped for several minutes and all passengers had departed.<sup>36</sup> Based on the condition of the banana peel the court allowed the inference of negligence: “We think that it could be found that the peel had remained on the floor of the bus so long that in the exercise of due care the defendant should have discovered and removed it.”<sup>37</sup> The court noted that no one was likely to carry a black banana peel onto a bus.<sup>38</sup> It went on to distinguish *Goddard* and *Mascary*, stating:

In *Goddard*...the banana peel did not appear to be other than fresh. In *Mascary*...where a banana peel was much like that described in the *Anjou* case, it lay on stairs leading from the street, and might have been recently thrown there by a child in play.<sup>39</sup>

The students might conclude *Scaccia* made this holding (rule).

Rule 1D: A jury may infer that a defendant was negligent for failing to remove a banana peel if its appearance and condition suggest it had been on the floor for a considerable period of time,

**and** no one other than its patrons or employees could have placed it there.

[**and/or**, a recent inspection should have discovered it].

#### *E. A Synthesized Massachusetts Banana Peel Rule*

At this juncture, each group should synthesize a rule from all four cases together. One such synthesized rule might be:

A jury may infer that a defendant was negligent for failing to remove a banana peel if its appearance and condition suggest it had been on the floor for a considerable period of time,

**And either** an employee of the defendant was present, **or** no one other than its patrons or employees could have placed it there.

Alternatively, the synthesized rule could be:

34. *Id.* at 765.

35. *Id.*

36. *Id.*

37. *Id.* at 765 (citing *Anjou v. Boston Elevated Ry. Co.*, 94 N.E. 386 (Mass. 1911)).

38. *Id.*

39. *Id.* at 765-66.

A jury may infer that a defendant was negligent for failing to remove a banana peel if its appearance and condition suggest it had been on the floor for a considerable period of time,

**And either** an employee guided plaintiff to the hazard **or** a recent inspection should have discovered the hazard.

Or:

A jury may infer that a defendant was negligent for failing to remove a banana peel if its appearance and condition suggest it had been on the floor for a considerable period of time,

**And either** an employee was assigned the duty to observe and remove the hazard, **or** a recent inspection should have discovered it.

Or:

A jury may infer that a defendant was negligent for failing to remove a banana peel if its appearance and condition suggest it had been on the floor for a considerable period of time,

**And either of the following two tests are met:**

**(1)** an employee of the defendant was

(a) present, **and either**

(b) guided plaintiff to the hazard, **or**,

(c) was assigned the duty to observe and remove the hazard.

**(2)** a recent inspection should have discovered the hazard.

Each of these rules meets the criteria of being simply stated, readily applied, and consistent with the pertinent authorities. The students should understand that more than one effective rule could be synthesized from the same set of cases.

#### *F. Applying their Synthesized Massachusetts-Banana Peel Rule*

Working in their small groups, the students are now in a position to answer the question of whether Sandy Banks can recover for the injury at Faneuil Hall. They should apply their synthesized rule to the facts presented. Each group can report its rule, application, and conclusion to the entire class. The other groups can explain whether and why they agree or disagree. To solidify what they have learned, and to show them how this process leads to a written document, as they leave class they can be given a sample, structured discussion of Sandy Bank's issue.<sup>40</sup>

### **Conclusion**

Students new to the law can learn to synthesize rules that are simply stated, readily applied, and consistent with the pertinent authorities. Teaching them this skill with actual cases exposes them to a situation that they correctly

40. One such sample is set forth in the Appendix.

perceive to be authentic and realistic. Having mastered their synthesis skills in class with short but genuine opinions, they are prepared to synthesize rules from longer opinions on their own.

## APPENDIX

### Sample CREAC re Sandy Banks & Faneuil Hall

A court is not likely to allow an inference of negligence against Faneuil Hall for having a discolored banana peel on its floor for three reasons. First, the peel may have been dropped by another recent visitor. Second, none of Faneuil Hall's employees was present to guide Sandy Banks toward the peel or see it immediately before the accident. Third, Faneuil Hall employees had not conducted a recent inspection that might have discovered the hazard.

In Massachusetts, a jury may infer that a defendant was negligent for failing to remove a banana peel if the peel's appearance and condition suggest it had been on the floor for a considerable period of time, and either an employee of the defendant was present to see the hazard or guided the plaintiff to it, or a recent inspection should have discovered the hazard. See *Scaccia v. Boston Elevated Ry. Co.*, 57 N.E.2d 761, 765 (Mass. 1944); *Mascary v. Boston Elevated Ry. Co.*, 155 N.E. 637 (Mass. 1927); *Anjou v. Boston Elevated Ry. Co.*, 94 N.E. 386 (Mass. 1911); and *Goddard v. Boston & Me. R.R. Co.*, 60 N.E. 486 (Mass. 1901).

In *Goddard*, where no evidence refuted the possibility that a recently arrived passenger may have dropped the banana peel on a crowded railroad platform, the court affirmed a directed verdict for the defendant. 60 N.E. at 486. The court reached a similar result in *Mascary*, where a woman slipped on a black, soft, and dry banana peel while descending a flight of stairs at Central Square Station. 155 N.E. at 637. As in *Goddard*, the *Mascary* court noted that some stranger may have dropped the banana peel "a moment before" the accident. *Id.*

The court came to the opposite conclusion in *Anjou*, allowing the inference of negligence when a woman slipped and fell on a black, flattened banana peel on a stairway at the Dudley Street terminal. 94 N.E. at 386. After the crowd had thinned the woman had sought the assistance of a uniformed employee and followed him to the stairway. *Id.* The court concluded that an inference of negligence by the defendant was supported by the condition of the banana peel and its position on the stairway where defendant's employees might have seen it. *Id.*

In *Scaccia* the court allowed the inference of negligence when a passenger slipped on a black, dirty, gritty banana peel on the floor of a bus. 57 N.E.2d at 765-66. The bus had left its terminus only nine minutes before the accident

and was carrying only three passengers. *Id.* at 765. The condition of the peel showed it had been lying on the floor so long that, “in the exercise of due care the defendant should have discovered and removed it.” *Id.*

In Sandy Banks’ situation, the spotted, leathery condition of the banana peel is not enough to support an inference that the owners of Faneuil Hall were negligent for failing to discover and remove it. As in *Mascary* and *Goddard*, the presence of a banana peel on the floor does not mean that the property owner was negligent, as it might have been dropped by a recent visitor. See 155 N.E. at 637; 60 N.E. at 486. This rule applies even if the banana peel is discolored and leathery. See *Mascary*, 155 N.E. at 637. In the Banks circumstance, any one could have visited Faneuil Hall after hours, just as Sandy did. Such a visitor could have eaten a banana and left the peel after the custodians had completed their work.

For a jury to infer negligence there must be more than a discolored peel. Unlike the situation in *Anjou*, here no employee guided Sandy through the facility, nor was an employee in a position to see the banana peel immediately before Sandy stepped on it. See 94 N.E. at 386. Nor had there been a recent inspection that should have discovered the hazard. The custodians would have completed their work after 9:00 p.m. (or 6:00 p.m. on Sundays) and the accident took place many hours later, at some time subsequent to Sandy’s arrival at 4:30 a.m. Such a lengthy open period is categorically different than the nine-minute window in which a banana peel was not likely dropped after the bus stopped at its terminus in *Scaccia*. See 57 N.E.2d at 765.

It might be argued that the brown, leathery condition of the banana peel is enough to show that someone may have dropped it before the custodians conducted their rounds. Such a showing is not enough to infer that Faneuil Hall was negligent. The banana peel would have a brown and leathery condition had it been dropped after the custodians left, but four, five or six hours before Sandy’s arrival. The fact that it may have been on the floor for several hours would show negligence if “it would have been seen and removed by the employees of the defendant” in the reasonable performance of their duties. See *Anjou*, 94 N.E. at 386. Since no employees of Faneuil Hall were on duty after the custodians left, none would have been in a position to see and remove a banana peel dropped after their departure.

No employee of Faneuil Hall guided Sandy toward the banana peel, and none had an opportunity to see it immediately before the accident. Nor had there been a recent inspection that, properly conducted, should have found the peel. Accordingly, it is unlikely that a court will let a jury infer negligence if Sandy Banks sues the possessors of Faneuil Hall.