Comparative Research

One of these Things Is Not Like The Others!
The Art of Comparing and Analyzing
Prepared For: Legal Education Society of Alberta
Legal Research

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A. INTRODUCTION

In the legal research and writing process, finding the law can be the least of your worries. What to do with it once you have found it is definitely the more challenging job, and can require that you:

- wade through reams of cases that say the same thing or, alarmingly, different things;
- decide which cases actually represent the current law;
- decipher the correct legal rule from the cases or legislation;
- based on the contents of the authorities you find, decide which of your client’s facts are important and relevant;
- identify the cases that are persuasive or binding on the court you are to address; and
- come up with the most compelling argument, based on the cases and legislation.

Efficiently and accurately analyzing the law is a skill set learned through practice. It is also an art form, requiring “intellectual flexibility and creativity”¹.

This paper is not meant as a comprehensive treatise on legal analysis. Rather, it offers what we hope is helpful information to assist you in your next experience in the analysis process, specifically in analyzing case law. For more in-depth information, look to the authorities cited in the footnotes.

B. FINDING THE LEGAL RULES

The key to determining your client’s case is, of course, finding the relevant legal principles and then applying them to the facts. In both legal briefs and court decisions, lawyers and judges tend to organize their comments that way: first the writer states the facts; next he or she examines the state of the law, and then he or she applies that law to the facts of the case.

A challenge in functioning in a jurisdiction like ours, involving stare decisis and legal principles that are not codified nor, in some cases, even concretely set out, is in finding the legal rules. Part of the difficulty is that, inherent in the process of stare decisis, legal rules become organic and can change over time.

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One author labels the initial rule as the "inherited rule", typically taken from the "seminal case" on a particular area of the law; and calls the finished product – or the result of a court applying the inherited rule – as the "processed rule". When a court in a later opinion applies the inherited rule, it may change the rule with the result that the rule coming out of that case is different in some way. Alternatively, the last opinion can simply add more information about the inherited rule so that the processed rule is the same but clarified. In any event, the rule that any researcher should be most interested in is the processed rule.

(i) Expressed and Implied Rules

Rules can be expressed by a court in its decision or simply implied, for instance where it does not overtly articulate the legal rule being employed to resolve the legal issue but rather leaves it unspoken or embedded in the decision, or only partially explained. Identifying unexpressed rules requires that you, as the case analyst, extrapolate the missing legal principles from the expressed part of the opinion or legislative provision.

(ii) Rule Synthesis

In some cases, where the court or the legislature expresses only a piece of a rule, it can be necessary for you to look to other decisions to gain a complete appreciation for the whole rule.

Rule synthesis is the process required to come up with a description of the whole rule, based on the varied pieces articulated in the legislation and/or case law. Essentially, you are building a holistic rule from its component parts, extrapolating expressed or unexpressed rules from various sources to construct a single legal expression.

Complicating the process is the fact that, in case law, courts can use different wording for essentially the same rule of law. As well, courts will consider only so much of a rule as is necessary to determine the case before it. The result is that it may not always be easy to see that you are comparing apples with apples. With that in mind, the synthesizing process may involve a minute analysis of the similarities and differences in the rules set out in your identified cases. To help in the process, one authority recommends dividing your cases into four categories:

1. Material that is identical in all of the rules applied.
2. Material that is similar in the rules applied.
3. Material that appears in only some rules and
4. Material that differs from rule to rule.

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C. **CASE ANALYSIS**

(i) **Case Synthesis**

Rarely will you find that Eureka! case that is completely factually on point with your client’s situation. More likely, your research will turn up a stack of cases involving the relevant rule of law but involving very different facts. To be able to use those cases to your client’s benefit, you must relate those cases to each other - or synthesize them - to be able to come up with an arguable application of the law for your client’s facts.

Case synthesis (sometimes called case fusion)\(^4\), like rule synthesis, requires that you examine the body of case law that addresses a particular issue. In synthesizing cases, you will blend the principles of each to form one holistic rule. This process requires that you study the critical facts in the cases to identify a common thread\(^5\). Based on that, you will build a legal analogy around that thread. The end result will be a fusion of the principles from various cases that is, hopefully, stronger than the sum of its parts.

In many cases, the courts, in their decisions, will have performed the process of synthesis for you. For instance, in personal injury cases, the court considering non-pecuniary damages will often survey the cases placed before it and compare and synthesize them to come up with an appropriate quantum based on the facts before.

Efficiently briefing cases will assist you in synthesizing them. Summarize the cases into short and well-organized formats that include their procedural history, how many times and by which courts they have been considered, their relevant facts, the issues decided by the court, and what the disposition was. Fitzgerald recommends using a "case comparison schedule" in which the cases, their facts, issues, etc. are tabulated and the cases themselves are identified as being either binding or persuasive\(^6\).

Fusing cases requires an appreciation of which cases are strongest. For instance, which are persuasive versus binding or which are more current. Once identified, arrange the cases to be synthesized according to these criteria.

(ii) **The Three Triggers**

There are three triggers in case analysis: jurisdiction, legal issue and facts\(^7\). These triggers require the legal analyst to:

1. Demonstrate that the court you are addressing is bound to follow a prior decision.

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\(^4\) ibid, p. 41  
\(^5\) Romantz and Vinson, p. 46  
\(^7\) Romantz and Vinson, p. 39