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Litigation Video Series
- Theory of the Case

PAPER

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Theory of the Case 1

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Source: Running an Effective Jury Trial – Saturday 11 May 2019

1. Introduction

1.1 The theory of the case and how it will be developed, enhanced and maintained throughout a trial will determine virtually every aspect of the trial. I believe the development of a sound 'theory of the case' is perhaps the single most important thing you will do as Counsel in preparing for and running an effective jury trial.

1.2 It organises your entire presentation and argument in court. The theory of the case is played out at the trial and culminates in a, hopefully, logical and persuasive closing address. The effectiveness of that closing address will largely depend on what precedes it.

1.3 A theory of the case is a positive, affirmative statement of what actually occurred and what the law directs should happen to an individual who has been accused in a situation.

1.4 If the trial is to be a persuasive story, from your perspective, the theory and theme of the case must be woven through every aspect of the trial from the opening statement to the final argument.

> "The judgments made on the theory and theme are vital because they should determine almost everything that the attorney does at trial. As a well-respected litigator has remarked, 'the trial is only playing out of the theory.' Every step at trial is explicable in terms of the theory and theme, and explaining the trial in these terms gives new meaning to many of the old bromides about trial advocacy."[1]

1.5 Accordingly, if a sound (and proper) theory is not developed from the outset, then implementation, planning for and effectiveness of other topics discussed in this intensive will be without a logical purpose. There would be no unifying strategy. You as Counsel will appear to the jury, the Judge and your client as being dis-organised. A jury may, understandably, see you as not presenting a defence (or prosecution case) that you truly believe in.

1.6 Studies have confirmed that many jurors begin to form an opinion about the case from the start of the process – despite being warned not to. So, as a result it can be helpful, depending

[1] Edward J. Imwinkkelried, "The Development of Professional Judgment in Law School Litigation Courses: The Concepts of Trial Theory and Theme", [1986] Vanderbilt Law Review, Vol. 39: 59, at 71.

on the facts of the case, to present your theory early on and take every opportunity throughout the trial to re-iterate it.

1.7 Moreover, without a sound theory from the outset, you will not know what pre-trial applications should be pursued and what objections may be necessary during the course of the trial. Your opening statement will not serve the purpose it is designed for, that is, to let the jury know what the issues are from your perspective. Cross-examination will be ineffective and lack focus.

1.8 A well-thought-out theory enables Counsel to ask the right questions and look for the right evidence to prepare for trial.

1.9 The 'theme' of your case can be a slightly different concept to the theory and may be a word or catch-phrase that captures a controlling or dominant emotion within the theory of the case, an example is the infamous comment made by defence counsel Johnny Cochrane in the OJ Simpson trial — 'if the glove don't fit, you must acquit'. This type of catchphrase can be something a jury can grab hold of and it can be helpful if your case has attracted media attention.

2. Developing a Theory of the Case — Preparation

2.1 So, how do you develop a theory of the case? Preparation, preparation, preparation! This is what (hopefully) you have been paid to do as a lawyer. Preparation requires of course reading statements, watching videos, listening to recordings, analysing, researching, meetings with clients and witnesses and eventually the exercise of sound judgement. No doubt it can be a challenge to reduce a complex case down to a persuasive and understandable theory.

2.2 How you go about this preparation will differ if you are acting for the prosecution or defence, but there is overlap.

2.3 My suggestions as to how to properly develop a theory of the case are as follows:

2.3.1 A logical starting point is to ensure you comprehensively understand the relevant law, this means being fully aware of the nature of the proposed charge, and the elements of that charge. Also then, the resulting potential defences. A breakdown of the elements of the charge is a good starting point including research on any of those elements that you do not fully understand, or perhaps need to revise, especially if there has been recent case law that is relevant and provides 'comment' on the way in which the Courts will now apply and or interpret a particular provision.

2.3.2 On occasion as the preparation continues you will need to consider how to get the necessary facts, you may want to rely on, into evidence. That will involve a consideration of the provisions of the Evidence Act.

2.3.3 The next obvious step is to acquire as much information as you possibly can. Learn all about the individual facts of the case including, importantly, what might be regarded as the 'good' and 'harmful' alleged facts. Harmful information can be more important than 'other' information when considering a credible theory.

2.3.4 You will need to be proactive in seeking disclosure, and of course counsel are now assisted in that regard by the provisions contained within the Criminal Disclosure Act 2008– something that you all should be familiar with. Sometimes disclosure indexes will be provided to you that are redacted. You will need to check whether the Police decision to not provide some information is proper and lawful. I suggest that you also need to ensure that you obtain the 'foundation documents' that, for example, led to the preparation of witness statements. These include Police notebook entries, job sheets or other original material that is utilised in compiling the final written statement you receive.

2.3.5 If possible, I believe that it is beneficial to receive that information, digest it and supply it to the client before sitting down and 'taking instructions'. This is not always possible – you may need to delve into facts and take instructions on a bail application – before full disclosure has been provided. It may be that there are already "instructions" vis-á-vis whatever has been said by your client to the Police in an interview. You will need to check with the client whether he/she stands by what has been said, and if not, why not.

2.3.6 So to formulate the theory of the case you need to take detailed instructions. While preparing for this seminar I researched various articles including some (predominately American) which spoke about "selecting the best theory". You need to be careful. Your theory of the case is dictated by (generally) your instructions and your obligations as an officer of the court. Your ability to 'select a theory' is fettered by these considerations. You couldn't run an 'alibi' defence if there was no foundation to do so – even if it may *prima facie* appear to have a good chance of success, as a theory.

2.3.7 Of course it is possible to "put the prosecution to the test" but more often than not in a jury trial, the defence needs to be more than simply putting the prosecution to the test – (as compared to a judge-alone defended hearing, say for drink driving, where there is a perceived technical deficiency). But don't get me wrong – the need to do more than test the prosecution case does not necessarily mean calling your client to give evidence!

2.4 There can be the opportunity, when working as defence Counsel and developing a theory, to be creative in the way in which you run your defence. Thought is required to assess the possible theories – and test against the 'facts beyond change' and 'plausibility' test. Is the theory consistent with the facts beyond change? Is it plausible? You need to put yourself in the shoes of the fact-finder – the jury. Bear in mind, a trial is not the presentation of every fact and every remotely possible legal argument.

2.5 For a prosecutor the position is necessarily different. The prosecution are presented with a case which has been investigated by the Police (or investigators from another prosecution agency), witnesses have been interviewed, a summary of facts prepared, charge sheets drafted, witness lists provided to the defence and court all in advance. So the prosecution theory of the case is very much dictated by work already completed by the Police prior to the file reaching their desk.

2.6 The process of taking instructions as defence Counsel is crucial because it provides a filtering process and focus. It enables you, whilst preparing, to put aside what will in the end be irrelevant evidence (or important evidence that is however, not in issue). A good example is "identity". If your client accepts that he or she was the person at a scene then evidence relating to identity, and identification processes, should be able to then be put to one side. Often that will now be dealt with by way of section 9 agreements as to facts that are not in dispute.

2.7 A chronology of key facts should be drafted where possible. When considering the facts (as advised) and developing your 'theory' you will relate this back to the elements of the charge and the possible available legal defences.

3. Formulating a Theory

3.1 Having investigated the case, i.e. interviewed your client and potential witnesses, reviewed all the documents, statements and other evidence, researched the law, considered possible evidentiary problems, and reviewed uncontested facts as well as your client's version of the disputed facts, you are now in a position to formulate the theory of the case.

3.2 To assist you in formulating or developing the theory of the case, James W. McElhaney[2] suggests that counsel should ask the following basic questions:

- Is this what really happened?
- Does this statement sound plausible?
- Does it add up to a claim or defence?
- Where are the holes in my case?
- Which of my witnesses are credible?
- What is the strongest point in my opponent's case?
- Am I ready to meet it?
- What is the weakest point in my opponent's case?
- Do I take advantage of it?
- Will my client's position seem fair to a neutral observer?
- How can I present it so it will?
- Will my opponent's position seem fair to a neutral observer?

These are factors for you to assess – some may be more pertinent than others.

3.3 You have considered the elements of the charge, the facts and your instructions. Remember that in doing so your final product (theory) should be a cohesive, logical view of the merits of the case that is hopefully not inconsistent with common everyday experiences, that builds on your strengths and finds ways to compensate for your weaknesses. It is primarily about the facts because they are what is most important to the jury.

[2] James W McElhaney, *The Picture Method of Trial Advocacy,* 1991.

3.4 The heart of it will be your narrative of what happened before, during and after the event. The central story you tell should be, if possible, rich and detailed - not just a bare outline. The factual part needs to be consistent with your client's version of what happened and the weight of the other relevant admissible and plausible evidence. In essence your theory, your defence, needs to be credible.

3.5 Elements of the case theory include the following:

- your factual narrative
- the identification of key facts within that narrative
- possible motives for what witnesses did or said
- the law (a statement of what you think is the proper legal outcome)
- emotions (although juries are told to keep emotion out of consideration they are human and if they want to return a verdict in your client's favour they will usually find a way to do so – find a way to create empathy if possible)
- your weaknesses (something you may not dwell on) and an assessment of the prosecution case (attack their weaknesses).

3.6 Some clients, and indeed some lawyers, think that it is possible to 'pull the wool' over a jury's eyes – in my experience that is seldom the case. Juries know when Counsel (and client) stretch the truth to far in order to try and establish a defence that it is simply not credible. Try to avoid that; in front of a jury keep it human, keep it simple. As the jury are told – one of the reasons they are there is to bring together their collective common sense in order to decide the case. Do not underestimate that collective common sense.

How Many Theories?

3.7 Some Counsel believe that if one theory is good then two or more are better. They adopt a shotgun approach hoping that one of the theories will stick. This is especially so in what appears as an overwhelming prosecution case - they (strong prosecution cases) do exist. If you are still proceeding to trial it may be that you simply have a difficult client (they exist too!). You may be tempted to have no theory, to shoot at everything that moves and argue every conceivable theory.

Should Counsel Take Multiple Theories to Trial?

3.8 The initial impulse might be to do so thinking that that is the "safe bet". However in my view there should only be one theory of the case. Certainly, you cannot take multiple theories to trial where the theories are inconsistent. There are inherent dangers in inconsistent theories. Presenting several theories creates the danger that the primary theory will be watered down if not entirely lost in the confusion.

3.9 When faced with multiple theories, counsel must exercise strategic judgement and choose a single theory for trial that is the strongest.

3.10 This is not to say that a theory should be inflexible – at times the theory will need to be amended and adapted, especially if evidence comes out in trial that was not predicted. That can happen, but as we have seen in Court of Appeal cases where conduct of Counsel is a

ground for appeal, you will need to take further, preferably written, instructions from the client approving any change in tack. On rare occasions you may have to consider taking a 'no stone unturned' approach if the evidence (usually from an important Crown witness) unexpectedly provides a defence that you were not anticipating.

3.11 Your final theory should have persuasive facts, strong emotions and a legal basis for the listener to find your client not guilty.

Benefits of a Sound, Credible Theory

3.12 As has been said, the theory of the case, a sound theory, sets the structure for the entire trial. It also serves as an important organisational tool for counsel and demonstrates to a jury that you as counsel are prepared, focussed and know exactly where you are going. No doubt, a Judge sitting with a jury will also appreciate a focussed Counsel, with a clear theory of the case. This should provide some benefit to you because even though the Judge is not determining the verdict he or she is required to 'sum up' your case. That summing up will potentially be more favourable if the theory is well presented. Simply put, it gives you a better chance of winning.

3.13 You are being watched by the jury. You are your client's representative in what is one of the most significant events in their life. So you owe it to your client to present with a clear, well-prepared, plausible theory. If it is amorphous the chances of success are significantly reduced.

Theory of the Case 2

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Excerpt Source: Running an Effective Judge-Alone Trial — Saturday 29 September 2018

Theory of the Case

4.1 From the receipt of your first instructions, you will be developing your "theory of the case". The theory of the case is essentially the basis for your defence.

4.2 A case theory is not simply that the defendant did not commit the crime or that the prosecution has not proved its case beyond a reasonable doubt. A useful starting point in developing a theory of the case is: "The defendant is not guilty because…"

4.3 A good case theory should be expressed in simple terms and is usually the one that makes the simplest use of all available information. Some theories are immediately obvious but you may need to undertake a thorough analysis of the evidence and the theory of the prosecution case before finally settling on the theory of the case.

In developing your theory of the case, it is essential to know the relevant law.This may sound obvious. Knowledge of the law includes primarily, the essential elements of whatever charge has been laid, including in particular the 'mens rea', but can also extend to knowledge of the law as to, for example, parties, the 'admissibility' of evidence, and other concepts.

4.4 If you do not have this knowledge, then you are in danger of providing advice that may not be correct or advantageous to the client.

4.5 As has been said previously it is best not to run several different theories of what actually happened, especially if the theories are inconsistent. This will only confuse the court and cast doubt on the genuineness of your case.

4.6 The theory of the case, as is said in the *Introduction to Advocacy* text is: "The guiding light that will assist you in the preparation and presentation of your case". Having a *clear, logical and persuasive* theory of the case is essential to good advocacy no matter how straightforward, or how complex, your case may be you should be able to reduce its essence to a few short sentences or propositions. If you do not or cannot then you will not truly understand your case. You will use your theory to determine the nature of your evidence, your cross-examination and your submissions. *If an argument or a question is not relevant to, or is inconsistent with, your theory, don't raise it.*"

4.7 A case theory must also be consistent with your instructions. It is important to remember that counsel are obliged to present the defence that the defendant wants to run unless there is an ethical or other impediment to doing so: *R v Condon* [2007] 1 NZLR 300 (SC) and *Hall v R* [2018] 2 NZLR 26. Rule 13.13(b) of the Conduct and Client Care Rules also states that a defence lawyer must "put before the court any proper defence in accordance with his or her client's instructions – but must not mislead the court in any way."

4.8 The theory of your case may also impact on your advice as to election.