

THE THEORY OF THE DEFENCE: IT HELPS TO BE CREATIVE

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Criminal lawyers can learn a great deal from the world of advertising. We too are involved in persuading people to act in a certain way, sometimes contrary to their best instincts and often despite the efforts of others to induce a different course of action. How do the men and women of Madison Avenue succeed? Corporations spend millions for the most creative minds to develop strategies to sell their product. Whether exhorting innocence, belief or disbelief of witnesses or lenience on sentence, we're in the same kind of business.

Every book and lecture of effective advocacy has a passage emphasizing the importance of having a theme to one's presentation. It's great advice but a bit like telling an insomniac that what he really needs is a good night's sleep. You know what you need, you just don't know how to go about getting it.

What follows is a brief discussion on how to go about developing that elusive component of the defence which might be considered the theory or theme. Think of it as the "Things go better with Coke" approach to criminal law.

1. IDENTIFICATION OF STRENGTHS AND WEAKNESSES

From first contact with the client, counsel will inevitably assess the strengths and weaknesses of the situation. Does the client describe a version of events which, if accepted (at least in the sense of a reasonable doubt), could result in an acquittal? Was there conduct on the part of the authorities which might lead to the exclusion of evidence? Is there a basis upon which to undermine the credibility or at least the reliability of the main Crown witnesses?

Our law school training has taught us that the denial of the act gives rise to a defence. We know at the outset that the theory of the Crown is “he did it” and the theory of the defence is “he didn’t” can make for an easy charge to the jury by the trial judge. Even the cross-examination in its most rudimentary fashion - “I suggest to you that what you have said isn’t true” - almost writes itself.

Further skill and study enables us to classify other possible defences as well, based on what the client says. The problems often appear when we see the disclosure.

A necessary step in the development of the theory of the defence is identifying what is most capable of being accepted by the trial judge or jury. Of the several options to choose, what is most probably palatable? It may be stimulating to call the arresting officer a racially-challenged liar but to do so might distract the trial judge from substantive issues less dramatically charged. The complainant in a sexual offence allegation might be shown to be a deceptive Jezebel but the same result might be accomplished by merely demonstrating that

her description is manifestly unreliable. Similarly, a spouse alleging an assault might simply have exaggerated the contact rather than fabricating the entire incident.

If we're thinking about selling, our first consideration has to be the position, including the needs and mind-set, of the prospective customer. How can we make it as easy as possible for him, her or them to do what we want? It starts with an evaluation of the likelihood that a certain approach will achieve the desired outcome. This will involve the choice of which battleground to focus on. The answer must be the one on which counsel stands the best chance of winning. That decision having been made, the conscious choice must follow to eschew those other fields of combat which involve greater risk or deflection from the reward.

2. THE "WHY" CHROMOSOME

Perhaps the most frequent question counsel should ask is the one rarely put in cross-examination: Why?

- Why is the complainant saying what she is, given that all that happened is what our client says?
 - Why make the allegation when she did?
 - Why continue with it today?
 - And why our client?
- Or--

- Why didn't the officer make note of the matter of which he now says he has an independent recollection ?
- Why did he leave out/misstate material information to the justice of the peace?
- Why did he arrest our client as opposed to an alternative suspect or at least continue with his investigation to find the unknown party?

The inquiry doesn't end with the case for the prosecution. The same questions can be asked about any aspect of the evidence for the defence.

To be persuasive, either in destroying the case for the Crown or in enhancing the defence position, we must always be thinking about human nature, not only to explain the course of action but to assist the trier in accepting the version we want. People don't act without a reason, even if it is as basic as instinct. Consideration must be given to the possible explanations that may account for the behaviour in issue.

This exercise might require counsel to "get into the witness' head" by a careful review of all statements, paying particular attention to any videotaped interviews. The development of a story with additional details over time might indicate a witness who has evaluated the initial version and felt that it needed enhancement. The claim that more events came to mind by the process of "just thinking about it a lot" might lead to the explanation that the time was spent in evaluating how the story would play when told in court.

By contrast, inconsistent versions of the same event might be accounted for by examining the process by which they developed, not just the fact or content of the inconsistency. It may be useful to explore how the first description came about with the attendant thought before and during the telling of the tale and how the details came to mind. A similar review of how the new story came about may reveal that the witness may have a mind which is fertile in the germination of seeds of sincerely-held but unreliable beliefs.

A similar tact may be used when the witness acknowledges an intentional falsehood. Why was it considered necessary? How was the particular description selected out of the many that might have been possible? With what sincerity was it stated? How did the witness manage to do so with such apparent persuasiveness? And, of course, why and how did the “truth” come to be told?

These are questions that counsel may wish to pose in the absence of the witness and seek to discern what the likely answers might be. Beyond that realm is one of possibility.

If your client can’t tell you why the witness is saying all of these horrible lies about him, how can you? Be creative! What realm of human experience might account for this behaviour? Knowing what you do about the witness is a start but you might have to imagine what other possible scenarios may account for the claim. Was there something happening in the life experience of the witness which prompted the story? Or something he anticipated? Some advantage he hoped to gain by going to the police? Or someone who may have been the cause of his

involvement? The list is endless but the objective is constant: why should the judge/jury choose not to rely upon the evidence of the witness?

Certainly the same approach might be applied to develop in greater detail the plausibility of the defence position. The creative approach, emphasizing not simply what the accused says occurred but why he did it or why his description accords with common sense and experience, is more readily worthy of acceptance.

It may not involve much more than the exploration of the parameters of the event in issue, extending to other aspects of his life which are consistent with his position.

3. THE BIG PICTURE

Many cases turn on a single witness but an equal number involve a combination of circumstances which may support a variety of competing inferences. What methods are available to develop the most compelling theory or theme?

It may be desirable to choose not to challenge many of the facts in issue but, rather, to emphasize the alternatives. In this regard, however, the theory must be developed in such a way as to encompass as much of the Crown's evidence as possible. For example, in a fraud or theft case involving alleged exclusive opportunity, the determination of the time frame for the property to go missing, the others who may have had the opportunity to have taken it, the needs of those others for the items in question, the personal circumstances of the

accused prior to and after the time of the alleged theft, unreliable bookkeeping or inventory controls and poor business practices might all be combined to create a compelling picture accounting for the loss by some manner other than theft by your client.

An alternative suspect who might be shown to have at least some opportunity, some reason to have committed the offence and who was not subject of meaningful investigation by the police may provide a basis for reasonable doubt if the effort is made to paint a credible and detailed picture of involvement.

The exercise may involve exploring, even imaginatively, what might have happened to account for the combination of circumstances or possibly those elements of which are missing where one would have expected them to be present.

Even the best efforts don't always provide an answer. An opened puzzle box occasionally has pieces which don't belong. There might not be an explanation for someone making a false allegation. The last resort of emphasis on the onus of proof and reasonable doubt may have to be relied upon but only after all efforts have been expended, physically and mentally, to develop a more substantial theory.

This process is best carried out well in advance of the trial. Whereas it might be more comforting to grind out detailed summaries of the evidence or research obscure legal issues, the exercise of thinking about the case from all angles may ultimately simplify the conduct of the trial. Without question, the development of a comprehensive defence theory can provide a kind of "litmus test"

for the decision-making process in formulating every cross-examination, identifying possible admissions of fact, determining defence witnesses to call and preparing final submissions.

4. WRITING THE SLOGAN

It has been said that the most complex fraud case can be prosecuted successfully if the theory of the Crown can be expressed in a single sentence. This illustrates the need for simplicity in persuasion. If you don't clearly understand the issues and your position on them, the trier of fact never will. Similarly, if you can't express your position in a fashion which may be readily understood, you may face an insurmountable barrier to success. Finally, you may understand and be able to communicate your position but find yourself faced with the equivalent of "OBJECTION, YOUR HONOUR - BORING!" which is sustained by an unsatisfactory outcome.

Once again, you should put yourself in the position of the listener. The judge may appreciate a point-form summary of the evidence and your submissions on it but will be moved by a compelling argument on why they should be accepted. How could a judge fail to appreciate "she had a guaranteed route out of her uncle's house so that she could live with her older girlfriend - allege that he molested her!"

Or, where the rudeness of the arresting officer is said to have precipitated the client's inaccurate description of how much alcohol he consumed that night

and the officer is obstreperous under cross-examination, “if he was like that before Your Honour here in court, imagine how he must have behaved towards my client at 2:00 a.m. on the Don Valley?”

A jury trial allows counsel much more room for creativity, particularly given the extensive media exposure to the criminal trial process. It may be difficult for them to remember the precise details of inconsistent descriptions of an event by eyewitnesses but they can easily recall the image you give them of the various descriptions of an elephant by seven blind Indian gentlemen, all of which are ultimately unreliable.

When you tell them that they can perform a simple experiment to decide if a Crown witness was lying: “Were his lips moving? If so, then he was.”, the depiction not only amuses but can be retained.

The step-child who was seeking attention, the lying co-accused who presents as the proverbial wolf in sheep’s clothing having bargained away his jeopardy for your client’s, the aggressive police officer who became committed to his theory and investigated only to validate it rather than explore the case with fairness and impartiality are illustrations of how one might wish to depict Crown witnesses in a closing address. The reality of a threat to one’s safety conjures up compelling images of the need for self-defence. The history of a loving relationship with one’s spouse over years prior to the descent into the depths of depression may provide strong support for a s.16 defence.

Whatever the issue, the objective is to enable the jury to remember your

position and act on it. This may best be achieved by deciding on the most compelling reason(s) for them to accept what you're saying, carefully drafting the phrases to use and, when the opportunity arises, conveying your theme early, emphatically and often.