

THEORY OF THE CASE

How and Why Developed - An Overview

Martin Scisizzi

Borden Ladner Gervais LLP

1. INTRODUCTION

Findings of fact are necessary to a resolution of disputes between parties. The function of the trial is to resolve factual disputes. One cannot overstate the importance of the facts. Advocacy skills alone, without thorough preparation and mastery of the facts, will not win a case. There is no substitute of thorough and rigorous preparation. While, of course, there must be preparation of the law, the more important preparation is the preparation of the evidence, the gathering of the facts and the marshalling of the evidence in a persuasive manner to establish the facts. It must be remembered that the law will be applied only after the facts have been found by the judge or jury. Once the facts are made clear, there is generally no great difficulty about the applicable law. Counsel's task is to structure and present the evidence in an organized and persuasive manner so as to lead the judge or jury to findings of fact in your client's favour. An effective advocate presents a persuasive story through organization, logic, simplicity, sincerity, and a coherent theory anchored by a theme. The theory and theme of the case are not only necessary persuasive tools, but also serve to focus counsel on the critical evidentiary and legal issues that will arise at the trial, and help counsel to organize and simplify the trial presentation by defining what is relevant and focusing the trial presentation on what is relevant and important.

The terms "theory of the case" and "theme of the case" are frequently used synonymously. There is, however, a distinction between a theory and a theme. The theory of the case is the adaptation of the story to the legal issues in the case. The theme is the pivotal element of the theory, or the one idea that tells the judge or jury why your client should win the case. The theory of the case appeals to the intellect and the theme appeals to the emotions. Perceiving the distinction is important to understanding why it is imperative to formulate a

theory early in the case and how theory and theme, although both important and frequently intertwined, play different roles in the pre-trial and trial process.

2. THEORY OF THE CASE

It is essential to develop a theory of the case early and to act in accordance with it throughout the case. Some have described the theory of the case as counsel's "game plan" or counsel's strategy. Others have defined the theory of the case as counsel's position and approach to all of the undisputed and disputed evidence, which will be presented at trial. The theory of the case is much more than a game plan, case strategy or position and approach to the evidence.

The theory of the case is not just the legal theory, nor the elements of the cause of action or defence; i.e. that which must be shown to permit recovery or establish a defence; nor is it just the factual theory, i.e. the explanation of why some testimony is credible while some is not. It is more than the legal elements of the cause of action and more than the combination of facts and law. James W. McElhaney, *The Picture Method of Trial Advocacy*, 1992¹, described the theory of the case as the legal and factual theory of what happened when tested in the fire of credibility and put in a way that reflects the values of the community.

The theory of the case is the adaptation of the story to the legal issues in the case. The theory of the case should combine the essential facts and the legal position in such a way as to lead to the conclusion that your client's claim or defence must succeed. The theory must be logical, simple, plausible, understandable and accord with common sense. As well, it must address the legal elements of the claim or the defence upon which the law permits recovery or establishes a defence.

The legal theory is the framework for the facts. It is with the facts themselves that counsel should spend the most time. The real test for a successful factual theory of the case is whether it will stand up. It must make sense, be logical and coherent and explain all of the uncontroverted evidence and as much of the opponent's evidence as possible. It must also

¹ James W. McElhaney, *The Picture Method of Trial Advocacy*, 1992.

account for what is weak in your client's case as well as what is strong. It should naturally appeal to the inherent sense of justice, but above all it must be plausible.

The theory of the case is more detailed and fact specific than a list of abstract legal elements. It is also more than a summary of the important or essential facts. The theory is the account of the ultimate facts counsel must prove to justify the legal outcome desired. The theory of the case should be expressed in a single paragraph that combines the specific facts and the applicable legal principles in such a way as to justify the desired legal outcome and lead the judge or jury to the inescapable conclusion that your client must succeed.

In addition to focusing the judge or jury on the basic framework of the story which counsel is going to present, the development of a theory of the case serves as an important organizational tool for counsel. It sets the structure for the entire action. It requires counsel to review the elements of each cause of action. It requires counsel to analyse how each required element will be proven through witnesses or other evidence. It requires counsel to analyse contradictory and disputed facts and other evidentiary problems which may arise and how these will be addressed. In short, the development of a case theory helps counsel focus his or her preparation and presentation of the story to the judge or jury and defines what is relevant and important information.

Conventional wisdom is that there should be only one theory. At the beginning of the case and as the case progresses through production and pre-trial discovery, counsel may have several theories of the case, some that compliment each other and others that may be inconsistent. One of the functions of the pre-trial proceedings is to eliminate theories lacking legal or factual merit. Certainly by the completion of the discovery stage all theories lacking legal or factual merit should be eliminated. Counsel must consider how various theories will impact upon one another. Certain theories may complement one another; however, other theories may conflict. Conflicting theories should never be presented either to a judge or a jury. Conflicting theories will not only undermine the credibility of your case, but will confuse rather than simplify the trial and challenge the common sense of the judge or jury. Multiple theories may also detract from the primary theory.

Some insecure counsel believe that if one theory is good, then two or more are better. They adopt the shotgun approach hoping that one of the theories will stick. Should counsel take multiple theories to trial? The initial impulse might be to do so to be on the safe side. In my view, there should be only one theory of the case. It is certainly inadvisable to take multiple theories to trial when the theories are inconsistent. There are inherent dangers in inconsistent theories. Inconsistent theories undermine all of them, as it implies that counsel believes none of them. This applies not only at the trial, but also to the pre-trial proceedings, especially where a case-management judge will be hearing all pre-trial motions and proceedings and will become familiar with the case. It is risky even taking multiple consistent theories to trial. Urging secondary theories can weaken your primary contention. Pressing several theories creates the danger that the primary theory will be weakened if not entirely lost in the confusion. Having one theory of the case is the most consistent and understandable way of presenting a case to a judge or jury. While counsel may get away with multiple consistent theories with a judge there should be only one theory with a jury. When faced with multiple theories, counsel must exercise strategic judgment and choose a single theory for trial.

3. THEME

Webster's New World Dictionary defines "theme" as "a recurring, unifying subject or idea". A theme song is a recurring song or melody in a film, musical or television program, often intended to set the mood, that becomes popularly identified with the work. Themes and theme songs are an integral and effective advertising tool. Effective advertising campaigns frequently incorporate a short statement to describe the product and its specific and distinctive qualities and characteristics that identifies it with the manufacturer. Like effective advertising, or like a good story, a case should have a theme or focus.

Just as the theme in advertising brings a specific and distinctive quality and characteristic to a product and provokes recognition of the product, the theme of the case is the label that anchors the theory to the morality of your client's position. As stated by Steven Lubet in *Modern Trial Advocacy Analysis and Practice*,² a logical theory tells the trier of fact the reason

² Steven Lubet, *Modern Trial Advocacy*, Canadian Edition, Sheila Block and Cynthia Tape (NITA, 1995), p. 8.

why a verdict must be entered for your client; a moral theme shows why it should be entered. An effective theme is the moral of the story, which motivates the trier of fact to action. The theme shows why the desired result is just, deserved or necessary. The most compelling themes appeal to shared values, civic virtues, or common motivations. The theme is the atmosphere counsel wishes to create in the mind of the judge or jury. Just as changing background soundtrack music can make a sequence in a film seem sinister, tragic, comedic, etc., the theme can set the tone for the case. The right theme will set the tone for the case and demonstrate the justness of your client's cause. Judges and juries will bend the law to fit the equity of the case. The theme can help put equity on your client's side. The right theme will remain with the judge or jury during the deliberation and will help persuade the judge or jury that a verdict in your client's favour is just and reasonable.

Just as there should be only one theory, there should be only one theme and it should dominate everything. An effective theme is easy to repeat, easy to understand and easy to integrate throughout the course of the trial. The theme should be developed early and maintained throughout closing. The theme should be unique to the case and simplify and make essential facts memorable. An effective case theme is easy to remember, one that a trier of fact can use during deliberations, is consistent with, and supported by the evidence and is logical and consistent with the judge's or jury's concepts of fairness and justice. In short, the theme should capture the theory of the case. To maintain credibility the theme should be consistent with every aspect of the case. The theme should present the underlying facts and legal theory and tie as much of the evidence as possible into a credible whole.

It is important to evaluate the parties' strengths and weaknesses before deciding the most effective theme. Generally speaking, a theme is most effective by presenting your client as the "focus " or "star" of the case. You should, however, consider how much star quality your client has. The client is not always the most powerful aspect of the case or may not always have the most appealing characteristics. It is important, therefore, to evaluate your client's strengths and weaknesses before deciding on the most effective case theme. Is the plaintiff a trusted employee, an able worker, a devoted spouse and parent, a respected member of the community? If your client possesses favourable characteristics, values and standards, your client should be the focus

of the theme. If your client does not possess star qualities, then perhaps the focus of the theme should be the other party. Regardless of who is made the focus of the theme, a good case theme should be unique, simple and easily understood as embracing the central facts of the case.

An effective theme often highlights contrasts between the parties or between the sides in a case, or both. For example, the theme may contrast the consumer and the manufacturer, the severely injured plaintiff and the powerful corporate defendant, or the plaintiff victimized by big business that ignored public safety, failed to warn or was driven by greed. Depending on the plaintiff and the nature of the claim, the theme may focus on the plaintiff as the victim. In other cases, the focus of the theme may be the defendant. For example, in a breach of trust or fraud case the theme might be: “this is a case about greed and what it can lead to in a falling real estate market”, or “this is a case about misplaced trust”, or “the plaintiff trusted the wrong people to do the right thing.” Inventive counsel can often come up with a catchy phrase for a theme that will capture the theory, embrace the central facts of the case and tie the case together for the judge or jury. David B. Baum in *Creating a Theme*³ gives the following examples which illustrate a simple, unique, and easily understood theme embracing the central facts of the case and the elements of an effective theme:

- Injury case: “A case of broken bones and broken dreams.”
- Product case: “The car with every option but safety.”
- Negligence case: “The doctor who never looked past the chart to see the patient.”

“This is a case where a young athlete entered the hospital for minor foot surgery and left in a coma.”

“This is a company that won’t take responsibility for its safety.”

Whatever the theme, it must be developed early in the case and reinforced throughout the trial. The theme should be introduced to the judge or jury during the opening statement and incorporated and reinforced throughout the trial, during examination-in-chief, cross-examination and final argument.

³ David B. Baum, *Creating a Theme*, Trial, Association of Trial Lawyers of America, March, 1994.

4. DEVELOPING THE THEORY

The starting point for preparing for trial is developing the theory of the case. The starting point for developing the theory is a thorough investigation of the facts, the identification of the issues in the case, a consideration of the applicable law and the identification of the evidence available on each issue. This will include a consideration of how to get the necessary facts into evidence. In addition, consideration must be given to the contrary evidence anticipated from the other side. This will include an assessment of the opponent's theory of the case.

To determine the strengths and weaknesses not only of your client's case, but also of your opponent's case, a thorough investigation of the facts is essential. Development of the theory begins with the initial client interview. However, counsel must keep an open mind to allow all possible theories to present themselves. The investigation should include not only a detailed interview with your client, but also an interview of witnesses or potential witnesses (adverse as well as favourable) and a review of documents and other physical evidence. It is critical to launch the investigation as soon as you are retained for obvious reasons, since witnesses' recollections fade with time, witnesses become increasingly difficult to locate with the passage of time, and with the passage of time documentary and other physical evidence may disappear. Counsel should quickly gather, protect and preserve the evidence for trial.

Counsel must also consider the law. Counsel must consider the causes of action or defences and the requisite elements of the causes of action for defences. Research into the law may expose new factual areas to investigate.

After having considered the elements of each cause of action or defence, counsel should analyse how he or she intends to prove each of the requisite elements through available witnesses and other evidence. This will include an analysis of admitted facts, readily provable facts, contradictory facts and facts which will be hotly disputed, the witnesses and documentary and other evidence the other side may present to put those facts in issue. In addition to the consideration of the contrary evidence anticipated from the other side, consideration should be given to plausible opposing theories of the case. Counsel will also have to consider the possible evidentiary problems that may arise and how those problems may be resolved or avoided.

Having investigated the case, i.e. interviewed your client and potential witnesses, reviewed the documents and other evidence, researched the law, considered possible evidentiary problems, reviewed uncontested facts as well as your client's version of the disputed facts and the opposing theory or theories, you are now in a position to formulate the theory of the case. To assist you in formulating or developing the theory of the case James W. McElhaney⁴ 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?

⁴ James W. McElhaney, *The Picture Method of Trial Advocacy*, 1992.

5. APPLICATION OF THEORY AT PRE-TRIAL STAGE

The formulation of the theory of the case is a two-way flow process: counsel will obtain information through the client and witness interview process, and the review of documents and other evidence that will suggest theories and lead counsel to modify or reject theories; in turn, the theories will direct counsel's search for information.

The early development of a theory will also affect tactical and strategic decisions made by counsel at almost every stage of the case. Some initial tactical and strategic decisions may be difficult or impossible to reverse. Even when the decision is not irreversible, the chances of success may be enhanced and considerable time and expense may be saved by a sound choice of initial tactics and strategy. The pre-trial tactical and strategic moves that will be impacted by the theory of the case include extra legal tactics, who the parties to the proceeding will be, whether it is more advantageous for the client to be plaintiff or defendant, positions on settlement, and whether the case should be tried by a judge or by a jury. As well, the theory of the case impacts on production and discovery.

(i) The Parties

Who should be the parties to the proceeding and in what capacity should they be parties are questions which must be considered by counsel in every case. Counsel must consider not only who are the necessary parties, but also whether proper parties, although not necessary parties, should be joined in the action. This will entail consideration of whether or not the addition of a party is necessary for the enhancement of the theory.

In the initial interview with the client, counsel will have to explore in detail the client's status and whether the documents support that status. One of counsel's first pre-pleading considerations is to determine the precise legal status and standing of the parties. For example, is the client a beneficiary of an estate or trust? Is the contemplated proceeding by or against an executor or trustee representing an estate or trust? Is the nature of the proceeding such that all the beneficiaries must be parties, i.e. Rule 9, the interpretation of a will, or a claim for fraud or misconduct against the executor or trustee. Is the client a shareholder or a corporation and is the

claim a derivative one? Are the parties assignees, partnerships, unincorporated associations, ratepayers, trade unions, trustees in bankruptcy, etc.?

There is also the question of legal competence. Counsel must consider whether the plaintiff or defendant suffer from a disability which requires the representation of a litigation guardian under Rule 7.

The theory of the case as well as the nature of the claim determines not only whether there should be multiple plaintiffs, but also whether there should be multiple defendants. For example, counsel will have to consider whether corporate officers and directors should be defendants along with the corporation. Counsel will have to consider whether the investigation of the facts and the theory support a claim for fraud or tort committed by the officers or directors giving rise a claim in their personal capacity.⁵

A number of tactical considerations must be borne in mind by counsel for a plaintiff contemplating proceedings with other co-plaintiffs, including possible conflict, true commonality of their position, varying opinions on the manner in which the case should proceed, liability for costs and the strengths and weaknesses of the various plaintiffs, including their characteristics or “star” qualities. Unfavourable characteristics or other weaknesses of one or more of the co-plaintiffs may detract from the appealing characteristics and strengths of the other co-plaintiffs.

The joinder of multiple defendants must also be given extremely careful consideration. While it may seem like a good idea on the part of the plaintiffs to use the “shot gun” or “scorched earth” approach and sue everyone in sight on the theory that the more defendants there are, the more likely one will be found liable, or that it may be easier to settle with multiple defendants on the basis that each will contribute a smaller amount, this approach may prove to be an imprudent or even dangerous tactic. The inclusion of multiple defendants solely for the tactic of attempting to force a settlement or with the hope that one or more of the defendants will be found liable, where there is no sound factual basis and is not in keeping with the theory of the

⁵ *Scotia McLeod Inc. et al v. Peoples Jewellers Limited et al* (1995), 26 O.R. (3d) (Ont. C.A.); *ADGA Systems International Ltd. v. Valcom Ltd.* (1999), 43 O.R. (3d) 101 (Ont. C.A.).

case, undermines the valid theory of the case, as well as creates the danger of undermining counsel's credibility with the judge or jury. Furthermore, counsel must bear in mind the cost consequences of asserting unfounded and unmeritorious claims, particularly unfounded allegations of fraud or dishonesty.

(ii) Extra-Legal Tactics

A particular theory and theme may lend themselves to effective extra-legal manoeuvring. Keeping in mind the desired result, namely to achieve a satisfactory resolution of the dispute, the result may be achievable through action taken outside the legal process. A particularly resonant theory and theme may lend themselves to motivation of the opposite party by way of adverse publicity or merely the risk of adverse publicity. Some businesses such as financial institutions, which highly value public trust and confidence, may be particularly adverse to bad publicity. Where the facts of the case are particularly egregious or the plaintiff is a particularly sympathetic party, adverse publicity or the risk of it may bring about the desired result.

(iii) Settlement

As settlement can take place at any stage of the litigation process, settlement strategy should form part of the litigation strategy. Settlement usually takes place after production of documents and examination for discovery, at or after the pre-trial conference, or more often just before trial. While it is desirable to settle cases early in order to avoid unnecessary time and expense, counsel is not in a position to make intelligent settlement decisions unless he or she is thoroughly prepared and able to assess the strengths and weaknesses of the case. Having thoroughly investigated the case, developed a theory of the case and assessed the strengths and weaknesses of the case, counsel is now positioned to discuss settlement.

While there may be many external reasons to settle and to settle at an early stage, such as the expense of the litigation, the financial condition of the parties or the death of a key witness, internal weakness in your client's case may also dictate the decision. If unfavourable evidence is discovered, or the witnesses either do not support or undermine the theory of the case, counsel will be negotiating from a position of weakness and it may be prudent to settle before the

unfavourable evidence or other weakness have to be disclosed to the opposing party or are otherwise discovered. On the other hand, if the evidence supports counsel's theory of the case, counsel is negotiating from a position of strength.

(iv) Plaintiff or Defendant

Counsel should consider whether the client would be better off as a defendant than as a plaintiff in the proceedings. Often, a client will have no choice. However, many times, clients, such as landlords, mortgagees or other secured parties will have the choice of exercising self-help remedies and leaving the other side to commence proceedings and asserting claims by counterclaim.

The theory of the case, the character and personality of the client and the nature of the case are some of the factors which counsel should consider in deciding whether there are advantages to the client being the "catcher" rather than the "pitcher". There may be instances where the client's story and counsel's theory will have the greatest strength and will be most persuasive after the other side's version has been told. As well, there may be disadvantages to being plaintiff and bearing the burden of proof. Counsel must weigh any disadvantages of the client being plaintiff against the advantages of controlling the litigation, telling the story first and creating the atmosphere in the minds of the judge or jury.

(v) Pleadings

The starting point for trial preparation is developing a coherent theory of the case. This theory should be reflected in the pleadings. The pleadings are the road map for production and discovery and should define with clarity and precision the legal and factual issues in controversy between the parties that must be resolved by trial. The pleadings are the first documents that a judge reads and therefore they are counsel's first opportunity to put forth the theory of the case. Pleadings should tell the party's story and reflect the theory of the case in such a way as to make the desired legal result seem inevitable. In other words, the pleadings are the first piece of written advocacy. Counsel should seize the opportunity to advance the theory of the case and

begin on the creation of the theme by a pleading whose hallmarks are conciseness, precision, brevity and consistency in word usage.

(vi) Judge or Jury

Early in the case counsel must decide the fundamental tactical question of whether the case should be tried by a jury. A jury notice must be served before the close of pleadings.⁶ Assuming the nature of the claim is not one where a jury trial is precluded by section 108(2) of the *Courts of Justice Act*, the decision as to whether a jury notice should be served is one of personal judgment. However, a number of factors should be considered before making the decision. One such factor is the theory of the case and whether it may be easier to sell the theory to a jury than a judge. If you have a sympathetic plaintiff or a sympathetic case, or the equities are in your client's favour, a jury may be better for the plaintiff.

Counsel must also consider how the client will fare before a jury, whether the client and other critical witnesses will make "good witnesses" and how the opponent's witnesses will stack up before a jury.

Other factors which should be considered are whether the dispute will likely be factual, whether the case involves primarily legal issues which should be tried by a judge, and whether there are weaknesses in the case that may be overlooked by a jury but not by a judge.

(vii) Discovery

Just as the term connotes, the main purpose of discovery, which includes discovery of documents as well as the examinations for discovery, is to discover the evidence upon which the opponent relies to establish a case or the defence. There are, of course, other purposes of discovery. These include to obtain admissions to help prove the case, to obtain admissions that will undermine the opponent's case, to evaluate the witness and to narrow the issues to be decided at trial. However, discovery is primarily the learning stage; the time to learn about the case to be met and thereby eliminate the prospect of surprise at trial.

⁶ Rule 47.

Discovery also provides counsel with the opportunity to develop and test his or her own theory of the case. Through a thorough and focused examination, judiciously and sparingly sprinkled with leading questions and cross-examination, counsel is able to develop and test the theory of the case. The theory of the case will guide counsel's enquiries and the evidence provided may result in the elimination of theories and the emergence of new theories. Similarly, the examination of your client provides an opportunity to test the theory of your case and to demonstrate whether your client is able to convincingly sell the theory at trial.⁷ Discovery should act as a fact filter for theories and should result in the elimination of all theories lacking legal or factual merit and lead to a closer scrutiny of those theories that will be difficult to prove. The elimination of a theory or the development of a new theory may necessitate amendments to the pleadings.

Discovery is also the opportunity to learn and better understand the opponent's theory of the case.

6. APPLICATION AND ENHANCEMENT OF THEORY AND THEME AT TRIAL

The trial is the playing out of the theory of the case which has been developed in advance of the trial. If the trial is to be a persuasive story, the theory and the theme of the case must be woven through every aspect of the trial, from the opening statement to the final argument. Professor Edward J. Imwinkelried makes this comment:

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 the 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.⁸

The theory of the case and how it will be developed, enhanced and maintained throughout the trial will determine virtually every aspect of the trial. Counsel must, therefore,

⁷ For a more detailed discussion see R.B. White, *The Art of Discovery* (Toronto: Canada Law Book, 1990) at 112 ff.

⁸ Edward J. Imwinkelried, "The Development of Professional Judgment on Law School Litigation Courses: The Concept of Trial Theory and Theme", [1986] *Vanderbilt Law Review*, Vol. 39: 59, at 71.

consider how the theory can best be advanced and maintained throughout the trial. A detailed discussion of the techniques of all aspects of persuasion at trial through the effective use of the theory and theme of the case is beyond the scope of this paper. For an excellent and thorough discussion of the subject I highly recommend to you Steven Lubet, *Modern Trial Advocacy*.⁹ This paper will merely touch on several aspects.

(i) Identify Potential Witnesses

Counsel should begin by preparing a checklist of the facts to support the essential ingredients of the theory, the evidence and source of the evidence for each ingredient and where each witness will fit into the development and enhancement of the theory. Once the factual elements necessary to establish the theory of the case have been determined, counsel is in a position to decide which witnesses should be called to establish the facts and develop the theory. Counsel must assess in advance, the character of the witnesses and the nature of the evidence to be adduced. A number of questions must be asked: How many witnesses will be called and what other evidence should be adduced? Do any of them corroborate each other? Are any of them crucial? What weaknesses do the witnesses have?

Counsel should never call a witness that can damage the case, unless the testimony is essential to establish a critical fact that cannot be proven in any other manner. Similarly, a witness whose credibility is likely to be impeached should not be called unless there is no other option and the witness's testimony is absolutely essential. The selection of witnesses is important so that the atmosphere of the theory of the case and the theme is not lost for a moment throughout the trial.

(ii) Preparation of Witnesses

Thorough preparation of the witnesses is essential so that their evidence will create the necessary impression, belief and conviction to support the theory of the case. The manner of presentation of the evidence will directly affect its probative value in the mind of the judge or jury. Witnesses favourable to your case must be thoroughly and carefully prepared for testifying

⁹ Supra 2.

to those facts that will support the theory of the case. Preparation involves reviewing those facts each witness can provide and preparing the witnesses to testify to those facts in a convincing fashion. Preparation of the witnesses should also include a discussion with the witnesses of the need for forthrightness and honesty, attitude, courtesy, mannerisms, language used and dress code, among other things.

(iii) Order of Witnesses

The theory and the theme of the case will influence the atmosphere counsel will wish to create in the minds of the judge or jury. Counsel must know what impression he or she wants to create. The theory, the theme and the atmosphere raise the question of what order should the witness be called. The order in which the witnesses will be called to give their evidence and the preparation of your witnesses may vary depending on the theory and the atmosphere counsel wants to create. Should the party be called first? Should expert evidence be tendered first?

Chronology is an obvious, natural and common organizing technique for presenting the evidence. However, this method may not be the most effective manner of developing the theory or theme of the case. Counsel's objective is to produce the maximum impact on the judge or jury, and therefore the witnesses should be ordered to accomplish this objective. In deciding what order will make the strongest impressions on the judge or jury counsel should consider the psychological principles of primacy and regency. Studies have suggested that judges and juries tend to remember best the beginning and the end of the trial. Although, generally speaking, presenting the case in chronological order or in some other logical progression is the conventional story telling technique which will be most familiar to judges and juries, starting with a strong witness and finishing with a strong witness may be more effective and create the maximum dramatic impact, particularly with a jury.

(iv) The Opening Statement

The opening statement is a critical stage in the trial. The opening statement is counsel's first opportunity to speak to the judge or the jury and although the opening statement to a judge should take a different form than an opening statement to a jury, the opening statement to both

should present a coherent theory of the case and introduce the central theme. It was said by Douglas K. Laidlaw, Q.C. that:

The objective of a good opening address is to seize the interest of the court and the jury and instruct them as to the essentials of the case to be tried both as to the facts and as to the law. The objective as well is to persuade the court and the jury as far as is possible of the righteousness and validity of your cause and to put them in a receptive frame of mind to the evidence that is about to follow.¹⁰

Effective opening statements to a jury should contain an introduction to warm up the jury, an impact statement that capsulizes the theory and theme of the case, the story of what happened, an explanation of the legal claim or defence, and a conclusion that brings together the theory, the theme, story and claim or defence for a just verdict.

An effective opening statement to a judge should outline the issues which the judge must decide, and provide a framework of the evidence the judge is about to hear. The framework for the evidence should incorporate both the theory of the case and the theme.

(v) Closing Argument

Closing argument must be more than just summation of the evidence. It must advance the theory of the case by weaving together all of the various factual threads into one coherent and persuasive story that will demonstrate the justness of your client's case and impel the judge or jury to find in your client's favour.

Just as every case should have a theme, so also should every closing argument have a theme. The theme should be present throughout the final argument. It gives order to the facts and infuses the testimony with emotion, thus appealing to the judge's or jury's sense of fair play and providing an incentive for a finding in your client's favour. A persuasive theory of the case appeals to the intellect and an effective theme appeals to the emotions.

::ODMA\PCDOCS\TOR01\4196860\1

¹⁰ Douglas K. Laidlaw, Q.C., "Opening Addresses" (1983), 4 *The Advocates' Quarterly* 184.