

A Gallimaufry of Basics

Prepared For: Legal Education Society of Alberta

Running Your First Trial

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For Presentation In:

Edmonton – January 21, 2015

Calgary – February 4, 2015

A GALLIMAUFRY OF BASICS

(Gallimaufry, n. a heterogeneous mixture; a jumble or medley)

This paper is divided into four very discrete sections. The commonality between them is that they all address at a high level some basic concepts related to preparing for and appearing at your first trial.

The first section of the paper discusses developing a theory and a theme for your case. The second section deals with proving your case including some basic evidentiary concepts to keep in mind. The third section outlines the order of events of the trial. Finally, the fourth section provides some general advice on proper courtroom etiquette¹

THEORY AND THEME

“If you aim at nothing, you'll hit it every time” - Zig Ziglar

Running a lawsuit can be like shooting at a moving target. Even the most carefully drafted pleadings may be based on incomplete or inaccurate information. By the time a matter reaches trial, those pleadings may have been amended more than once, or the parties' understanding of the case that is proceeding to trial may bear little resemblance to the pleadings as originally filed. One way to help ensure that you stay focused on the claim or the defence that you are building throughout the course of a piece of litigation is to develop a theory and a theme for it. The theme and theory may have to be altered or refined as the litigation progresses and new facts and evidence emerge, but they serve as an important frame of reference throughout.

What is a Theory?

Good trial lawyers are good story tellers. They understand the importance of knowing the story that they want to tell and of establishing the basic facts that tell that story. They know how to tie key pieces of evidence back to their story line and the necessity of having alternative sub-plots for the story where the evidence is unclear or contradictory and they are not sure how it may unfold at trial.

¹ ¹ Much of the content of this paper derives from the following sources:

Steven Lubet, Cynthia Tape and Lisa Talbot, *Modern Trial Advocacy Canada*, 3rd ed (Boulder: National Institute for Trial Advocacy, 2010).

Lee Stuesser, *An Advocacy Primer*, 3rd ed (Toronto: Thomson Carswell, 2005).

CED (West 4th), vol 26, title 61.

Steven Lubet, “Trial Theory and Blind Poetics: Framing the Questions to Persuade the Decision-Maker” (2006) 100 NW UL Rev 295.

Stevenson & Côté, *Alberta Civil Procedure Handbook*, 2015, Volume 1, (Edmonton: Juriliber Publishers) [Stevenson & Côté].

The theory of your case or defence is basically the summary of your story, focusing on the key facts that make up that story and the how those facts relate to the legal elements of the cause of action or defence that you are advancing.

A good theory generally meets the following criteria:

- It is short. A single paragraph should be sufficient in most cases.
- It is simple. The more complicated your story, the more difficult it will be to try to remember all of the pieces and how they interrelate.
- It is credible. Your story should be consistent with common sense and basic human experience.
- It is logical. The evidence and reasonable inferences should lead naturally to the conclusion.
- It consists largely or entirely of undisputed facts.
- It satisfies the necessary legal elements that must be established.

Developing and Using a Theory

Before you are at the stage where you can develop a comprehensive theory of the case, you will need to have a fairly good understanding of what the litigation is about in terms of the facts and the law.

Depending on the nature of the case you may have most of the factual information early on, or you may have to wait until the exchange of records, or until questioning of one or all of the parties has been completed. As further facts emerge you may have to revise your theory or abandon it altogether and craft a new one.

You will also need to understand the legal elements of your case or defence and to update your research periodically to ensure that the law continues to support your theory.

One way of developing a theory is to start by writing your closing argument. Assuming that things transpire as you are hoping that they will, what arguments will you put forward to convince the Court that your version of events is the one that should be accepted, and the result must be a decision in favour of your client?