

ADVOCACY TIPS

CASE THEORY IN CRIMINAL CASES

In a criminal trial how can I develop a defence theory from a bare denial? How do I put it into practice at trial?

An effective defence theory informs your preparation and execution of the case, and gives you a clear direction for dealing with each piece of information, and each advocacy element in the entire trial. But how do you proceed where your client's instructions are limited to a bare denial?

An example

Take a typical case of affray arising from an allegation made by two officers that your client threw a bottle at a demonstration. Your client might simply deny throwing a bottle, and you may feel able to tell the jury no more than that the allegation is denied. For the defence theory to be persuasive, it would have to go further.

A starting point may be to ask yourself what emotions the jury are likely to feel about the evidence which will be led to them. If negative, how will the defence either change those emotions or outflank them in order for the jury to be satisfied that the right thing to do in the circumstances is to acquit your client. In reality, perceptions of the demonstration case above may take on a different flavour depending on the cause for which the defendant was protesting. Although formally irrelevant to the question of his conduct, it is a part of the case which will have the potential for a strong emotional impact. The jury's perceptions of the defendant may vary if they hear evidence that the defendant was an organiser, a protester, a hanger on, or perhaps a journalist or a photography student, or someone who had simply stumbled across the protest. If a protester, is he a veteran of countless protests, with no record for prior arrest? Was the issue for which he was protesting a personal one, which had adversely affected a family member? As to the protest itself, was this in fact lawful?

You might identify for yourself the most immediate questions the jury will ask? As well as 'What was the defendant doing there in the first place?' the jury might ask why the officers might be lying, or how they could both have been mistaken. If in the course of the trial process the defence can suggest credible answers to these questions (or rather a *possible* answer) then your client will be entitled to acquittal.

- An effective defence theory

The defence theory - usually grounded in the defendant's instructions - is the story you want the jury to arrive at about what happened in the case. It should not be limited to your client's instructions because your client may not have as much information or insight as you do (and the jury will have) about why events might have occurred as they did.

At an early stage of planning you might note the theories which could be available to the defence to account for the evidence, and consider their respective merits in terms of credibility/likelihood, degree of conflict with police, evidential consequences, consistency with defence instructions, and other considerations

The defence theory in the affray case might be that:

- Officers have genuinely seen someone else throw a bottle, and are simply mistaken on identity.
- Officers saw your client handling a bottle and mistakenly thought he threw it.
- Officers made a random arrest in order to be allowed to leave a very frightening demonstration.
- Officers have lied because they are frightened of being considered responsible for the head injuries sustained to your client at arrest.

- Officers have lied because they genuinely think your client was an inciter or organiser.

The defence theory is a clear and simple explanation of why the case should be (and can easily be) resolved in favour of your client. Its components are punchy and credible factual elements that reflect the reality of the situation and understandable human responses to it. It should also be sufficiently flexible to accommodate the evidence taking off in unexpected directions.

- Structure your cross-examination to advance the theory

Depending on your proposed defence theories, you will approach cross-examination very differently. The feel, tone and extent of cross-examination in the examples above, would all be very different. Yet they are all possible theories in relation to the same case. Let the form and content of cross-examination reflect your possible theories, rather than the other way round .

In practice, you will probably want to advance on a number of fronts, adapting your approach in the light of answers you receive. But where do you start? You know that there are certain matters you must cover in cross-examination. You must challenge disputed evidence and you must put your case. But you will also want to bring out any additional information which might serve to undermine, explain, outflank or contradict the prosecution account and to advance your chosen defence theory.

The challenges to the witness are an important piece of theatre. This is a time when the advocate's questions may carry as much weight as the answers, often even more. This may be the first time that the jury will hear a description of your client's case, as set out by you, the advocate. Since this is an element that can be prepared very carefully, it is incumbent on the advocate to have available a series of simple, clear, persuasive propositions to put to the witnesses for the other side.

It may not be appropriate to put the entire theory each time - perhaps the witness has only given evidence about a small part of the whole. Putting the case is both an obligation and an opportunity, and the effective advocate will exploit every chance to send a coherent and compelling message to the jury about what the case is really about.

- Show the jury the way home

If you have chosen the defence theory well, and pursued it properly during the trial, the evidence in the case will now have armed the jury with more information and more insight into how the case arose and how it should properly be disposed of in the way which your client wishes. The closing speech brings these elements together in an attractive and engaging way, helping the jury to give effect to a greater civic good than simply convicting those the police say they suspect of crime.

Along the way, the jury will of course consider credibility, opportunity, discrepancy and a host of other values associated with the content of the evidence. But when they return home to tell their partners or pets why they decided to acquit your client, the words that will spring to mind will be the simple, clear and persuasive words you chose for the defence theory.