



# Tie Your Case Together with A Good Theme

By Gerard Mullins

**W**hether you are presenting a client's case at mediation, settlement conference or trial, delivering an avalanche of facts without a unifying theme does little to help persuade the listener. William S Bailey, in a paper delivered to the American Association for Justice Convention in Chicago, 2007, notes that lawyers too often make the mistake of stringing together a series of facts in a case without a unifying theme. Facts that are not conscientiously arranged in support of a theme will not persuade. When a lawyer fails to provide a theme, the listener will do it for themselves – but it might not be the theme the lawyer hopes they will adopt. Ensuring that the facts form part of a theme, and that the theme is identified and taken up by the listener, requires careful consideration and development of both the theme and the facts. Summarised below are Bailey's pointers that can help the lawyer to define and present persuasive themes.<sup>1</sup>

## DEFINITION

A theme is 'the conceptual string that runs through and holds the work together; loosen it or break it, and the work tends to fall apart. Whereas story is the growth of character, theme is the development of an idea. The story provides the mythic and emotional skeleton ... theme provides conceptual coherence.'<sup>2</sup>

The lawyer's goal is to arrange a few ideas, images and feelings so that the audience will want to linger among them rather than lose focus under a bombardment of facts. With the theme as a guide, a lawyer will not throw the wrong facts out or keep the wrong ones in.

The most powerful themes in any presentation involve general life topics that resonate with ordinary human beings. An identifiable human dilemma must be at the heart of the story. Subtlety is the key – the theme is most effective when it is kept unseen, providing the structure on which to hang the details of the story.

## HUMAN PERCEPTION OF THEMES

Philosophers, religious figures, psychologists, and artists have sought to understand the larger issues of human existence, focusing on the meaning of life and death and human interactions in everyday life. Aristotle looked at

the relationship of art to the human soul. He said that the function of tragedy was to effect catharsis – to draw out the emotions of pity and fear in the theatre audience. He viewed this as a kind of soul therapy, in which witnessing the tragic accident caused the spectators to harmlessly discharge their passions through vicarious suffering.

For any form of art to have an emotional impact, there has to be a degree of audience identification. In a play, film, or book, the protagonist can be neither completely evil nor perfect, because the audience must recognise the character as human to feel any degree of sympathy for the character's suffering. It is tricky to try to reduce the fact pattern to a core theme that will communicate with all potential listeners.

For example, trial lawyers often try to use the theme that human beings are diminished by the pain and loss of physical function. While everyone recognises that certain injuries cause suffering, pain is a private experience that is invisible in its workings and subjective in its effects.

To understand what themes resonate with human beings, an examination of the works of one of the founders of humanistic psychology, Abraham Maslow, is instructive. He saw an innate goodness in human beings, who seek to achieve an ideal state of normality through successful need gratification. Maslow theorised that when given safety, love and respect, people work better, perceive more efficiently, use intelligence more fully and reach correct conclusions more often. He concluded that the gratification of these fundamental needs is essential and that their frustration and deprivation breeds sickness. A good starting point is to focus on the importance of basic needs and the misfortune that follows when the satisfaction of these is taken away.

## FIGHTING CYNICISM

A great barrier to communicating a positive theme is society's growing cynicism. The lawyer needs to take this into account by answering the question: 'Why should I care about these people?'

This is where Maslow's primary needs come into play. If the lawyer can establish that the plaintiff is a human being, with the same needs and wants as the listener, it will create a certain level of identification and a response from the listener to the effect: 'There, but for the grace of God, go I'. >>

**THEMATIC STRUCTURE**

The theme serves a vital role in meeting the listener's need to resolve conflicts in the evidence. Listeners prefer the explanation that best reconciles the greatest number of discrepancies. A theme must meet this need.

In many cases, it is difficult to find a 'straight bright line' that will incorporate all the apparent contradictions in the case. The theme must be capable of reflecting and account for all the evidence that is likely to be accepted by the listener.

The theme will often spring from the story itself. Bailey gives an example of a case in which the neighbour asked a plaintiff to help bore under the neighbour's driveway. The neighbour asked the plaintiff to put his hand on a rope attached to a motorised auger. When the machine was started, his hand was pulled into the machine, causing serious injury.

The defendant argued that the plaintiff was at fault for putting his hand on a rope attached to the augering machine. He should have seen that doing that was dangerous. The assertion was neutralised by an argument that the plaintiff was the kind of person who was always willing to lend a helping hand to his neighbour. When his neighbour called for help, he came willingly and did as he

was asked, trusting that his neighbour would not ask him to do something that was unsafe.

**CONCLUSION**

The theme is not the story, nor the theory of the case. It is the central unifying understanding, linked to the humanity of the listener, that encourages the listener to understand and comprehend the story. It is the foundation of a persuasive case. ■

**Notes:** 1 William S Bailey, *Developing A Theme That Sells* (2005) available at <http://www.furybailey.com/Articles/TrialAdvocacy/DevelopingTheme.html>. 2 Tristine Rainer, *Your Life As A Story* (1997), p212.

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