WRITTEN ADVOCACY AND ARGUING POINTS OF LAW

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Skeleton Arguments

Skeletons are now a universal tool of our trade. It was not ever thus: first used in civil proceedings for trials and appeals, they have spread into the Administrative Court, the Family Division and the Crown Court. Now no criminal practitioner is safe from an order at a directions hearing for the delivery of a skeleton – particularly on abuse hearings. Indeed, in *R v K* in May 2006 the Court of Appeal said that a judge was entitled to deal with preliminary matters in a criminal trial entirely by written submissions, and that he could limit their length.

Do skeletons toll the death knell of oral argument, as is sometimes said? They shouldn't; they are an example of getting your retaliation in first – of persuading the court of the merits of your case before the first words leave your mouth. They should aim to prepare the ground for the oral submissions that will follow. Ideally, they should make oral submissions redundant, so that if you are an appellant, it is your opponent who is invited onto his feet first.

The things to bear in mind when preparing a skeleton

(1) Try and present the Court with a document which can be used as the basis of the judgment.

Judges want to avoid adding to their list of reserved judgments, so if you can provide them with a prompt for an ex tempore judgment, they will seize the opportunity. There is nothing more gratifying for the advocate when listening to the delivery of a judgment than to realise that the Court is using your skeleton as the judgment's framework. For the same reason, if the judgment is likely to be reserved, have a copy of your skeleton available on disc so that quotes from statutes or authorities, or even your recitation of the facts, can be transplanted into the judgment.

(2) Style varies: we all have our own styles, and it would be boring if we did not.

Aim for the middle ground – somewhere between a text message from a teenage daughter and a brief for the US Supreme Court. It should be neither telegraphese, nor a submission to the editor of the LQR.

(3) Do not exalt substance at the expense of form.

A skeleton not only needs to read well, it needs to look good. How it looks really does matter: make it look enticing.

4) Get it in on time.

There is nothing more disadvantageous for your client than having the judge read into a case with only your opponent's skeleton argument. There is also nothing more embarrassing than having to ask the judge to rise on the morning of the hearing to read your skeleton – unless it be everyone sitting in court in dead silence while the judge reads your skeleton on the bench.

(5) Mark it clearly.

Skeletons do often go astray in the court system, especially in the Royal Courts of Justice: so ensure they are properly identified on the front page. Paddington Bear had a label in case he got lost. So should your skeleton. It should have: the title of the case; the party whose skeleton it is; the time and date of the hearing; the name of the judge; and the court number (if known). It is a good idea to add your name and the date on the front page as well as on the last. If possible, fax or e-mail the document to the judge's clerk. That way you can be sure it has arrived on time.

The structure of a skeleton

(1) First of all a reading list

Identify, with cross-references to their page numbers in the bundle or bundles, the pleadings, witness statements and key documents which the Court needs to read before the hearing. Don't over load the list, unless you know the judge has a reading day set aside for a heavy application or trial. Then add an estimate of how long the reading will take.

(2) A brief introduction to the case

This should contain a description of the parties and the nature of the litigation, followed by a bird's eye view of the issues which fall for decision by the Court. Tell the Court what you are asking it to do, and very shortly why. Make it clear what order you are seeking – for example, the nature of the injunction sought, or the overturning of a Master's order for disclosure.

(3) The facts of the case

Be succinct: this may necessitate being selective, but do not be partisan. You are not trying to justify war in Iraq – so leave out the spin. Make the Court realise it can rely on what you say. If the Court suspects that relevant facts have been mis-stated, omitted or spun, it will be that much less receptive to everything you have to say thereafter. You will be able to shorten your account of the facts, if you prepare a separate cast list (dramatis

personae) and a chronology as appendices.

(4) A chronology

Chronologies are particularly important: we have all had the experience of seeing for the first time a vital point, when putting facts into date order. A procedural chronology is an equally vital aid for the Court – particularly in family cases. The Practice Direction of 1 March 2000 requires a chronology as well as a skeleton. In a recently reported case, *E v Channel 4 Television* Munby J deplored the fact that the task of preparing the judgment had been made the more time-consuming by the absence of a chronology. He said it was depressing to have to complain, and that urgency was no excuse. The CPR Pt 52 Court of Appeal Practice Direction states that "a chronology of relevant events will be necessary in most appeals".

(5) Identify and list the issues for decision

If it is an appeal, take them one by one, and say how they were decided below. The Pt 52 Practice Direction expressly states at para 5.10(1) that a skeleton "must contain a numbered list of the points which the party wishes to make". It goes on: "These should both define and confine the areas of controversy. Each point should be stated as concisely as the nature of the case allows." State which rulings of the court below are challenged, and why. If you are a respondent, it is normally good sense to follow your opponent's grounds of appeal item by item. If you can, give the issues a label by which you can refer to them later in the skeleton (eg the liability issue, the contributory negligence issue, the remoteness of damage issue).

(6) The law

Naturally tackle this issue by issue. Quote the text of any relevant statute. Deal with the relevant authorities: ensure that, where they are reported in the Law Reports, all references are to the Appeal Cases, Queen's Bench, etc. When quoting authorities, by all means set out the really critical passages, perhaps in italics or a different typeface. But never more than a paragraph. Remember what Lord Justice Sedley said about precedent: it is like a Jewish mother; you don't have to do what she tells you but it makes you feel terrible about not doing it. Deal with the authorities which are against you: there is never any point in ducking an issue; and it is best to confront any difficulties by way of a pre-emptive strike.

Don't twist the law; to quote Lord Justice Sedley again: "Intellectual dishonesty, even in a good cause, is not easy to disguise." David Robertson, an Oxford academic, who investigated the decision-making processes of the Law Lords, says that he was told by them over and over again that they tried not to cheat. And neither should you.

Once again make sure that you comply with Pt 52 PD; para 5.10(3) requires you to state "in respect of each authority cited: (a) the proposition of law that the authority demonstrates, and (b) the parts of the authority (identified by page or paragraph references) that support the proposition."

Whichever court you are in, help it by attaching a bundle of authorities with an index. Sideline the relevant passage. Don't copy the whole of long cases, if it is not necessary: just the headnote and the relevant passage. In the Court of Appeal collaborate with your opponent to prepare a bundle of authorities which complies with para 15.11 of the Pt 52 PD. Try and ensure that it does not contain more than 10 authorities, and lodge it 7 days before the hearing.

Do not forget to certify that you have complied with the requirement in para 5.10 to state in your skeleton argument the proposition for which each authority is cited. You should never hear in oral argument, the terrible question from the Bench: "Just why are we looking at this, Mr Browne?"

(7) Submissions

This is the critical stage at which the law gets applied to the facts. Take the points in a logical order: they need not be in the same order as the grounds of appeal, but it helps if they are. There is nothing worse than starting with a bad point: discard it, if necessary. Lord Justice Mummery tells Gray's Inn advocacy students to make their strongest point first and build on that. They tell them: "Try to focus on the three best points, if there are as many as that. There is nothing worse than overload." Sir Hartley Shawcross once had a case with three points before Lord Goddard. He said one was hopeless, one arguable and one unanswerable. Lord Goddard was having none of that: "Just give us your best one" . . . "Oh No", said Sir Hartley, "I'm not telling your Lordships which is which."

Make sure you respond to the other side's case. This is obviously much easier in the Court of Appeal where the skeletons are served sequentially, and not exchanged.

Remember when you are at a directions hearing the possibility of obtaining an order for sequential service. Keep the style and content as simple as you can – short paragraphs assist the Court to follow the thrust of the argument. Don't overload your paragraphs so that they look dense.

Presentation of the skeleton: a few tips

Spend as long as you can making it look professional. Use names, rather than references to 'claimant' or 'respondent'. People's names are easier to follow (if necessary, using abbreviations for commercial institutions). In litigation with numerous parties, a reference to 'the fifth respondent' will have the judge struggling to recall the identity of the party. It is preferable not to use surnames: 'Smith' and 'Browne' sounds rather curt.

Group your paragraphs under explanatory headings indicating the topic being covered; and, if necessary, use sub-headings.

Use wide margins and wide spacing of lines, at least 1.5. This enables the judge to write comments. Use a large font: Times Roman is commonly used and use font size 12. Blackstone says that Caligula wrote his laws in very small characters "the more to ensnare the people". Don't do the same, or you'll find you've got a horse as your leader.

Pagination is imperative. So is simple paragraph numbering: a surprising number of judges dislike American-style numbering. So use 1, 2, 3; a, b, c in preference to 1.1, 1.2, 1.3.

Another dislike of the Gray's Inn judges is footnotes: the Law Reports don't have footnotes. Case references are contained in the body of the text, unlike textbooks. If you cannot resist the temptation to use footnotes, at least never put any point of substance into a footnote. If it really is a point of substance, put it in the main text.

Finally, proof read carefully; a third person will pick up typos, spelling mistakes and bad grammar much more readily than the author.

Try and finalise the draft in sufficient time for your instructing solicitor to read it before it has to be lodged with the Court. This is not just a professional courtesy – a solicitor may be anxious about the way the case is to be presented. So he or she is entitled to the opportunity to suggest improvements. And very often they will provide most helpful suggestions.

The hearing itself: dealing with judicial interventions

Rumpole always complained about that vice of the male judiciary – premature adjudication. It is certainly true that with skeleton arguments a Judge or Lord Justice is likely to come into court with a strong provisional view. Only recently Lord Walker of Gestingthorpe in a Privy Council appeal from the Cayman Islands pointed out that Judges who intervene to shorten things usually find that they have not succeeded.

Judges do have some leeway: we have been told by the Court of Appeal that it was impermissible for a judge to roll his eyes and throw his pen down. On the other hand, describing the basis of a plea as 'fatuous', saying it was clear what had happened and reserving the Newton hearing to himself was no more than expressing a provisional view – albeit robustly.

So be prepared for the Court to focus fairly quickly on any perceived weakness in your case. This can easily end up imperiling the structure of your argument; but try and deal with questions as they arise. If you really feel that you are being taken out of your way, if necessary say you will come back to the point. But make sure you then do so.

The skeleton should not be a speaking note; the oral argument should be the opportunity to develop and expand the argument, but, above all, to respond to your opponent. If you are opening an appeal, relate your submissions to the points in your opponent's skeleton, which may not have been foreseen and adequately addressed if skeletons were exchanged simultaneously. If you are a respondent, listen carefully to the exchanges between your opponent and the Court. Then take an early opportunity to deal with the points which have been raised. If something quite new arises, don't be afraid to produce a supplemental skeleton or note overnight.

You may have to take points in a different order to that in which they appear in your skeleton. So cross them through as you go, so at the end you can see what has not been covered. Tell the Court where you are in your skeleton;

don’t wait for the despairing question: “Where are we now, Mr Browne?"

Difficult judges

Keep your cool with difficult judges: there are far fewer than there were. In the early 1970s I remember seeing three members of the Privy Council using their formidable personalities to demolish in not much more than five minutes an advocate who had travelled from New Zealand to appear before them. That would not happen today – the late Lord Taylor CJ said that his generation at the Bar had suffered so much at the hands of tyrannical judges that on appointment they had become almost too tolerant themselves.

So how do you deal with difficult judges? Remember there are two sides to this question; only last week at a Judicial Studies Board Course we were discussing how to deal with difficult counsel – for example, the barrister who inquires of the Recorder whether he is remotely interested in affording the accused a fair trial. The JSB advice is to defuse the situation: be firm, but don’t let it blow up into a major confrontation. And the same goes for difficult judges.

Lesson one is not to weary them: many judges find much of their work tedious, or so we are told by the ex-Mr Justice Laddie. But, in retiring at the age of 59 on the grounds of tedium, he was doing no more than following the example of Lord Devlin. Stellar names such as Lords Justices Atkin and Birkett are amongst those who in the past have described work in the Court of Appeal as “very dull”.

The next thing is to exclude the possibility that they are being difficult, because they are right and you are wrong. Sir Thomas Inskip, then the Attorney General, must have thought that Lord Birkenhead presiding in a gaming appeal in the Lords was being difficult when he delivered the appropriate monosyllabic response to the Attorney’s submission that roulette was a game played with cards.

If you realise you are in the wrong, don’t waste time before acknowledging the fact and rendering a gracious apology. Otherwise stand firm, but remain courteous. The more courteous you can remain, the more the judge’s conduct will appear unreasonable. The contrast will be apparent to all those in court (and to the Court of Appeal when they read the transcript); eventually it may even become apparent to the judge himself.

Don’t resort to sarcasm, still less return insult with insult. Don’t snap your law report shut, or throw your papers down on the desk. This sort of conduct is still seen, and it really is the forensic equivalent of throwing toys out of the pram.

The truth is that most difficulty with judges these days is not the result of their leaving the wrong side of an unfamiliar bed at the Lodgings, but of vigorously expressed scepticism concerning the intellectual content of an argument. It is at this stage that your preparation becomes critical: the more you have thought through all the ramifications of your argument, the harder it becomes for the judge to present you with a difficulty.

Sometimes it helps to defuse a stormy situation by using your skeleton as a life raft: tell the Court the answer is at paragraph 47, and then pause while they re-read it. If the argument is really going nowhere, and you have no further ammunition in your locker, move the Court on to the next point. Just say: “Your Ladyship has my submission on liability, perhaps I can now turn to quantum?”

Finally, not every judicial intervention is hostile: sitting at Southwark in the summer I was surprised how often counsel seemed to react automatically to a judicial intervention and treat it as destructive, rather than constructive (as was intended). On the other hand, don’t leap onto every passing bandwagon. Some gift horses do need their mouths examining. I once won a case in the House of Lords, because my opponent had enthusiastically embraced a bad point thought up for him by the Court of Appeal after oral argument was over.

When Stephen Hockman was giving evidence to the Joint Committee of both Houses scrutinising the Legal Services Bill, one member of the Committee invited him to agree that there was no justification for the Bill at all. This is how Stephen replied: “There are times in court when the judge offers you a point and it may be wise sometimes to hesitate before embracing it with too much enthusiasm.” Now, note how skilfully he continued: “I do myself see the reasons behind this Bill and I see some benefits.” He then, of course, went on to list all the Bill’s vices. ■