The Inns of Court College of Advocacy

Skeleton Arguments

The Hon. Mr Justice Green

Transcript of video

Justice Green As chairman of the Advocacy Training Council (ATC), I'm delighted to introduce this film on skeleton arguments. The ATC is committed to the promotion of effective training in all aspects of advocacy, and this includes written advocacy. The following talk by Mr Justice Dingemans explains what is required in the skeleton argument, in both the criminal and the civil context.

Justice Dingemans I suspect that all of you listening to this video will already be producing good skeleton arguments. The aim of this talk is to help you produce excellent skeleton arguments, and I attempt to do that by setting out 15 suggestions for good practice. I've taken those suggestions from practice directions and guides, some reported cases, from comments made by other judges, and from practitioners in other talks about skeleton arguments.

My first suggestion is this; and it is to follow the mandatory requirements set out in the relevant practice directions. You'll all know that there are guides set out in the Court of Appeal with formal requirements for skeleton arguments. The Chancery division, the Queen's Bench division, the Administrative Court, the commercial and technology and construction courts all have guides with detailed provisions for skeleton arguments. The current extracts are set out at the back of the whitebook, so far as the criminal procedure rules are concerned; at paragraph 66.3 - at the time of giving this talk - the form of appeal notice is set out, and that sets out again formal requirements for skeleton arguments.

The second suggestion is this; that the heading of the skeleton argument is used to tell the reader on behalf of which side the skeleton argument has been lodged. For example - Claimant Skeleton Argument or Defendant Skeleton Argument.

This might seem obvious, but it's often ignored. A skeleton argument which is headed only Skeleton Argument leaves the judge to try and work out which side has filed it, and that is not always the easy task that might be imagined, mainly because the drafter has failed to follow suggestions about being persuasive - which I'll come to in the future.

My third suggestion is to use numbered paragraphs and number the pages consecutively. This is a formal requirement of a number of the guides, but complaints have been made about skeleton arguments which use small type, single-line spaces - and that's in breach of some of the provisions in the practice directions. There should be at least 1.5 line-spacing and at least 12-point type, and that again is a formal requirement for some of the skeleton arguments. And there should be a space between each paragraph, as this makes it easier to read, and notes to be made. It is not helpful to go into paragraph 3.1.2.3, because by the time

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you've worked out where that is in the whole sequence it is very difficult to follow.

My fourth suggestion is this; identify the advocate who's produced the skeleton argument. That again is a formal requirement of some of the guides, but it's more than mere formality - it means that you are responsible for the contents of the skeleton argument. Now we've all been in situations where you've sat in rooms with a thousand people trying to make a contribution to your skeleton argument - that's part of the proper process of taking instructions - but, you are the person responsible for skeleton argument and your name must appear at the end.

Fifth suggestion is to date the skeleton argument below your name. Now you might wonder why that's important, but in cases where a number of interim applications have been made copies of old skeleton arguments lurk in court files.

Giving a date makes it very easy to identify that the document is an old skeleton argument, and if matters are appealed it also enables each side to identify which skeleton arguments - and which arguments - were being run at the particular time.

The sixth suggestion is to summarise - in one or two short sentences at the start - what the relevant hearing is about for the court. For example in a personal injury action the introduction might be “this is a liability only hearing, of the claimant's claim for damages, for personal injuries arising out of an accident at the (whatever the name of the restaurant is) on the 18th of June 2014”. Or, in an application to stay criminal proceedings as an abuse of process, the introduction might be “the defendant has been charged with various money laundering offences, and this is the hearing of the defendant's application to stay proceedings as an abuse of process”. It has also been suggested in other talks, that it is very important in criminal appeals to set out what is common ground between the defence and the prosecution, and if it is an appeal against sentence, to set out any basis of plea.

My seventh suggestion is this: to identify the legal or factual issues which are engaged before the court very early on in your skeleton argument. For example, in a short tripping accident you might say “The issues are first; whether the defendant tripped the claimant as he walked past the defendant’s table. Secondly; if so, whether the defendant's actions fell below the standard of a reasonable, prudent and competent person sitting at a restaurant table. And thirdly; whether there was any contributory negligence on the part of the defendant.” That enables the judge immediately to identify what the issues are that are going to be determined. In a criminal case you might have “the issues are first;

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whether the crown has failed to disclose documents relevant to the proceedings and secondly; whether a fair trial of the proceedings is now possible."

The issues should - if possible - be identified by agreement by prior discussion with your opponent. Discussing issues with your opponent in advance of the hearing will ensure that there is a reduced risk of the parties' submissions failing to engage with the important matters at the trial.

My eighth suggestion: identify immediately your own side's contentions, on each of the issues. For example, going back to the tripping case; if you're acting on behalf of the claimant you might follow up the issues paragraph with this: "The claimant's case on the issues is first - that he was tripped by the defendant's outstretched legs. It's common ground that the claimant fell by the defendant's table, there was nothing apart from the defendant's leg to cause the claimant to fall. Secondly - that reasonable customers in restaurants do not leave their legs out to trip up other customers. And thirdly - the claimant was not to blame for the accident; leaving legs outstretched across the restaurant is not something which the claimant should reasonably be expected to keep a lookout for." Or to go back to the criminal abuse of process case: "the defendant's case on the issues is one - it is apparent that relevant and important email communications between the bank and company - which has been obtained by the prosecution - have not been disclosed" and two "it will not now be possible to have a trial which is fair to the defendant."

The ninth suggestion is to use headings throughout the skeleton argument. For example, going back to the tripping scenario - the customer who has tripped in the restaurant - headings in the skeleton argument might be; Introduction, Issues, Reading List and Time Estimate, Tripped By the Defendant's Leg, Not Reasonable Behaviour for a Customer in a Restaurant, No Contributory Negligence and Conclusion. And it might be noted, that the headings themselves can properly be used to argue your case - for example; the heading is Tripped by the Defendant's Leg, not The Cause of the Fall. That's very much a technique used in American proceedings, and one which is very persuasive when set out in a good skeleton argument.

And that brings me on to my tenth suggestion, which is to be persuasive. A skeleton argument enables you to persuade the court of the merits of your case, whether in relation to the law, the facts, or preferably - and not always - sometimes both. It's very easy to assume that just because you've spent so much time on the case - and a point has become obvious to you - that the court will spot all your best points. The court may not, and if there is a proper point to be made - make it.

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But the eleventh suggestion is this; to be fair. For example, if there are authorities inconsistent with your proposition, you must identify and deal with them. This is no more than your duty as an advocate, but it also enables you to be persuasive, for example, by setting out the authority and making the proper points that you can make in relation to it straight away. And the same practice should apply to facts; contentious descriptions of the other side's case or evidence very rarely persuade, and do not assist.

My twelfth suggestion is to attract the attention of the court. For example, in a skeleton argument on an appeal - where you're trying to get permission to appeal - it is particularly important to attract the attention of the court. For example - talk about a personal injury case for these purposes - you could say 'This proposed appeal raises important points about the proper approach to be taken in catastrophic injuries arising out of the relationship of public funding and private care packages where there've been findings of contributory negligence".

That is more likely to interest the court than the other un-contentious, but weak opening; "this is a proposed appeal about the cost of care provided to the claimant". Remember that judges are human, and probably - after a period of time on the bench - have picked up some interest in the law, and it is better at least to try and engage that interest than to just set out a very neutral, and in some respects boring opening paragraph.

My thirteenth suggestion - and which is a formal requirement of some of the guides - is to identify the proposition for which an authority is being cited, when you are referring to authorities. For example, the case of Spiller v Joseph [2010] UKSC 852, [2011] 1AC 852 is cited as authority for the elements of the defence of honest comment - and those elements are set out in paragraphs three and 105 of the judgement. The skeleton argument should also identify, for example, whether it is known that a legal opposition is controversial. To go back to the restaurant example, a case might be: "Customers in a restaurant owe other customers of the restaurant a duty of care to use reasonable care when stretching out their legs". It's understood that this is not a controversial proposition, and you will have understood that from your earlier discussions with opposing council. But this can be contrasted with a following proposition:

"Customers adjoining passageways in a restaurant owe duties similar to those owed by landowners adjoining a highway to users of the highway. The authorities establishing the heightened duty owed by landowners are summarised in Harold v Watney (1898) 2QB Queen's Bench, 2:30, 322-324.

Although there is no decided case establishing the proposition that a customer adjoining a passageway in a restaurant owes such a heightened

duty, the imposition of such a duty would be a logical and fair application of the law to the facts of this case". Now I make it clear that that is not a proposition that you should advance in any skeleton argument, all I'm using is that as an example of how you can set out propositions in a short, succinct and persuasive way. In criminal proceedings do not cite numerous sentence precedents in the Court of Appeal as it has been said in a number of reported cases that such comparisons are useless. But it is very helpful to identify the relevant sentencing guideline, and set out the material extracts from the guideline, and if there is a basis of plea - as I've already indicated - that should be put into the skeleton argument.

My fourteenth suggestion is this: consider whether to add a reading list and time estimate. In some cases this will be a formal requirement of the guides, in which case it will be necessary to incorporate these into the skeleton argument. If you want the court to have read a particular document before the hearing it helps to have given notice.

And my fifteenth and final suggestion - but by no means the least important – is this: be concise. The increased numbers of cases required to be determined by judges in the same judicial sitting day means that judges particularly appreciate concise skeleton arguments - and it is a skeleton argument, not a note of oral argument. The Chancery and Queen's Bench guides both state (at the time of this talk) that there is a maximum limit of 20 pages, and most skeleton arguments should be shorter than that. Other guidance suggests a limit of 15 pages on appeals, and for interim applications five pages may be too long. There are a number of comments in the law reports - which I'll come to very shortly- which show that long skeleton arguments are more likely nowadays to be penalised.

Can I just deal, very shortly, in the time remaining with some other matters?

First of all, when to draft a skeleton argument. It will be necessary to produce a skeleton argument where the rules of court require it, but it is often very helpful even when you have a short, uncontested application to put in a two-paragraph skeleton argument for the judge saying "this is an application for (whatever it is), the application is now agreed". That will save the judge an awful lot of reading Using a skeleton argument at a hearing: in oral argument it should hardly be necessary to refer to the skeleton argument. It many cases the argument will have moved on since the skeleton arguments were produced and lodged, and although at the time of drafting the skeleton argument it might not have been possible to set anything differently in oral submissions, that will change because you will have the other side's skeleton argument. Do not make the mistake of reading out a skeleton argument, and it has been said that the only time it should be necessary to refer to a skeleton argument is where you are

setting out an extract from a statute or an authority - and the court will then be able to see it set out without having to note it directly itself, and it will save everyone from having to open another bundle of authorities.

I should just finish off with a couple of warnings from recent authorities from the Court of Appeal. In *Tombstone v Raja* Lord Justice Mummery said this:

"Practitioners who ignore practice directions on skeleton arguments, and do so without the imposition of any formal penalty are well-advised to note the risk of the court's negative reaction, to unnecessarily long written submissions. The skeleton argument procedure was introduced to assist the court as well as the parties by improving preparations for and the efficiency of adversarial oral hearings, which remain central to this court's public role. Skeleton arguments should not be prepared to as verbatim scripts to be read out in public, or as footnoted thesis to be read in private".

He also said this:

"An unintended and unfortunate side-effect of the growth in written advocacy has been that too many practitioners - at increased cost to their clients, and diminishing assistance to the court - burden their opponents and the court with written briefs."

And in case you thought he was alone in making that complaint, in Standard Bank Pie v Via Matt International (2013), EWCA Civ-490, Lord Justice Moore-Bick said that "It was a matter of concern that the skeleton arguments produced on the appeal ran to a total of 116 pages, of which by far the greater part was made up of the appellant's skeleton and supplementary skeleton arguments", and he went on to say that "it is important that practitioners understand that skeleton arguments are not intended to serve as a vehicle for extended advocacy" and that "in general a short, concise skeleton is both more helpful to the court, and more likely to be persuasive than a longer document which seeks to develop every point that the advocate wishes to make in oral argument".

And finally, in case there some practitioners in areas of law that consider themselves exempt from the rules, and that their cases are too long, or too important, or too expensive to justify brevity, the judgement of the Court of Appeal in Tchenguiz v Director of the Serious Fraud Office [2014] EWCA Civ 1333 emphasised that the rules applied to all classes of case, and in that case the claimants were not entitled to recover the costs of a non-complaint skeleton argument.

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