SKELETON ARGUMENTS: A PRACTITIONERS' GUIDE

Over the past few years, we have been fortunate enough to have been able to include among the papers for these training weekends three excellent papers on skeleton arguments written by Lord Justice Mummery, Mr Justice Hunt and Edmund Lawson Q.C., the last of which appended a fictional skeleton argument demonstrating how to put their tips into practice. With their kind permission, these papers have now been collated by Geraldine Andrews Q.C. into what we hope will be a comprehensive and easy to follow single paper which combines the judicial perspective with what your leader (if you have one) and your instructing solicitor will expect you to aim to produce. We have also been bold enough to add one or two comments of our own.

MICHEL KALLIPETIS Q.C.
GERALDINE ANDREWS Q.C.
August 2004

INTRODUCTION

1. Skeleton arguments are now required on all civil appeals, all administrative court proceedings, at trial in civil cases (opening and closing speeches) and for interlocutory applications. They are often required as a result of orders made at directions hearings, even in criminal cases. Check your practice directions to make sure what is required and what the time limits for service are - in Haggis v DPP (07.10.03) Brooke LJ threatened to make "disagreeable orders as to costs" for non-compliance. Skeleton arguments are expected for any case involving substantial argument at first instance, and are desirable in every case where substantial argument is anticipated. They are frequently a boon to the judge even when not ordered or required.

2. Sir James Hunt has told us of the (unattributed) judicial reaction on receiving

a 35 page document which was to the effect “This is not a skeleton, it’s a fat stiff’. Nor would attribution add to the impact of the remarks of a judge who received a manuscript document covered in coffee seals on the morning of trial and said it was “difficult to read, disgusting to touch and impossible to understand. It is worse than no skeleton at all”.

3. Such comments only demonstrate the truisms that

   a. A skeleton which on receipt produces an adverse reaction is a negligent own goal.

   b. A skeleton which is a lengthy recitation of the whole body of the case will not assist.

   c. A manuscript skeleton handed to the judge on the day of trial does not have the same effect as that presented to him with the case papers earlier in the week.

   d. Presentation matters enormously.

WHAT IS THE PURPOSE OF A SKELETON ARGUMENT?

4. Advocacy is the art of persuasion through communication. The increased use of written advocacy is not, as some claim, the death of oral advocacy. A carefully drafted written submission can, when skilfully used at the oral hearing, enhance the impact of argument. Even critics of written advocacy recognise that, at the very least, the use of a skeleton argument allows the advocate two shots at persuading the court of his case. It is the golden opportunity for you, the advocate, to persuade the judge of the merits of your case even before you open your mouth. Ideally you should aim to produce a carefully crafted instrument of persuasion designed to inform, educate, elucidate and persuade the court both in advance of and in conjunction with your oral argument.

5. On that approach the written submission should not be

   a. a US type court brief;

b. a script for a lecture to a class of first (or last) year law students;
c. a professorial style commentary on the strengths and weaknesses of the case;
d. an impassioned speech to constituents or to the House of Commons;
e. an introductory warm-up to a group therapy discussion or TV chat show;
f. the first draft of a Law Review article;
g. private shorthand jottings of points intelligible only to the writer.

6. To be effective, the submission should provide the court with a reasoned justification for finding in your favour. The judgment of the court will have to do that, if you are going to win. Why not perform that task for the court by producing a persuasive document with the qualities of a good judgment?

7. In short, your skeleton can be used as an implement of decision. That is what you should be aiming to achieve. The court, not the client or the solicitor or your opponent or you, is the "consumer" (though a well-crafted skeleton can often have the bonus effect of persuading your opponent to offer to settle). When drafting a skeleton it is vital to bear in mind what you want the court to say when it gives judgment. The most flattering judgments incorporate half the skeleton.

8. Needless to say, in any skeleton it is vital to give the judge the issue, to pose the question(s) he must answer. Above all it should give him the answer.

PREPARATION and PLANNING

"Cases are won at chambers " (Lord Bowen to his pupil - HH Asquith)

9. Think out the case on your seat, not on your feet. Perspiration reaps more rewards than inspiration. Read the papers. Master, muster and marshal the main facts. Research law and refine - select relevant and best cases. Always ask yourself whether you need to cite a particular authority, and why. Do not snow the court with all the results of your research or stifle it with unnecessary information. **No overload**.

10. Do a proper case analysis (work out your "battle plan"). Review all the

material. Sort out the good from the bad. Work out the facts you need to prove in order to make good your submissions. Strip your submissions to essentials. Identify the difficulties in your case, and face up to them.

11. Be a FOX and a HEDGEHOG. “A FOX knows many things, a HEDGEHOG knows one big thing.” The hedgehog wins in the end IF he knows the one big thing which can win the case- the dispositive point. BUT you have to be foxy in searching for that one big thing and in anticipating and answering the points of your foxy (learned) friend.

LAYOUT

12. Pleasing plain presentation is essential. The written submission should radiate “feel good”.

13. Put yourself in the position of the judge. He is the consumer. Make life easy for him. If you are producing a number of documents, ideally you should put them in a ring binder and use dividers with an index (skeleton on top, then chronology, schedule of facts if appropriate, dramatis personae, extracts from cases or statutes, etc. etc.) If you are not going to produce the document in a ring-binder, submit it with holes ready-punched, and either stapled in the top left-hand corner or treasury-tagged.

14. Make the document user-friendly:
    a. Use one side of the page only. Skeleton arguments are impossible to handle and there is no room for notes if they are stapled and both sides of paper are used.
    b. Use wide margins. Judges like to write notes on skeleton arguments and you yourself may find it useful to have space to note down your opponent’s arguments or points raised by the judge;
    c. Use big spacing - at least 1.5 between lines, though you may get away with single spacing for quotations (judges’ eyesight does not improve with age).
    d. Use a large font - Times Roman 12 is the minimum, though Hunt J.

prefers size 14 (see c above);

e. Paginate it (bottom centre is preferred).

f. Number your paragraphs – use 1, 2, 3 and (a)(b)(c), NOT 1.1, 1.2, 1.3 (some judges find American style numbering irritating and it is apt to cause confusion).

g. Use headings (and sub-headings) to introduce topics: start with an Introduction and end with a Conclusion.

h. Avoid using footnotes, particularly for submissions. If the point is worth making, it should be in the body of the skeleton. If it is a side comment, save it for oral argument if you need to make it at all. Footnotes are (just about) permissible for cross-references if putting them in brackets in the body of the document is going to interrupt the flow.

15. Always provide a Chronology in any case in which dates are important - e.g. a strike-out for want of prosecution. Keep any Chronology separate. Judges prefer not to have to flick forwards and backwards through the skeleton argument to remind themselves of key dates. The same applies to a Dramatis Personae where there are numerous "main characters". If there are only a handful (say two or three principals), you could devote a short paragraph in the body of the skeleton to introducing them, or mention them in the course of setting out the facts.

16. Use names or (defined) abbreviations instead of respondent/appellant or claimant/defendant, which change with appeals and can be extremely confusing in multi-party litigation. It also helps everyone, including the Judge, to remember that they are people. Remember, though, to define the labels at the earliest opportunity, e.g. "First Skeleton Argument of the Defendant ("John Smith") or, in paragraph 1, "this is an appeal by the Defendant, Credit Agricole Indosuez ("CAI") from the judgment of Mr Justice Jones dated…." Once you have settled on a name, keep it consistent throughout the skeleton argument and don't swap between "Claimant" and "Mr Smith". If you decide to use surnames throughout, e.g. Smith and Brown, again be consistent: to call one party "Mr" whilst using another's surname looks rude.

17. Avoid lengthy quotations from transcripts or authorities padding out a thin case. Key quotes can be useful—otherwise give cross references.

18. Be in a position to offer the judge the disc in Court if he requires it, so that he may take from it the parts of the key judgment(s) he needs or the sections of statute he has to recite. If you have done your work effectively, he may even incorporate the finding you seek from him in his judgment!

STRUCTURE AND CONTENT

19. **Heading** – "Skeleton argument on behalf of....." Three vital words which are often omitted. It is rather important for the court to know whose skeleton it is, and it is not always immediately apparent from the text. If this is a case in which it is likely that several skeleton arguments will be submitted, number them: "First Skeleton Argument of the Defendant ("John Brown"). In that way, the judge can keep the skeletons in date order and immediately find the one he wants to look at.

20. Beneath the Heading, in smaller type, add your name and the date. Judges find it useful to have this on the front page as well as on the last page.

21. Start with an Introduction. Keep it brief and to the point. A statement of purpose is essential: it controls the form, content, style and length of the submission. So it is an introduction, a brief overview, a statement of your position. Tell the Judge what you want, why you want it and why he should give it to you. E.g."This is an appeal by the Defendant ("Mr Smith") against the decision of Master Topley who refused to dismiss the action for want of prosecution or breach of a court order. The Claimant ("the Bank") asks the Court to uphold the decision of the Master, who exercised his discretion correctly because
    a. The breach was the first breach by the Bank and was not deliberate;
    b. There can still be a fair trial of the action;

c. A strike-out would be a disproportionate step when lesser sanctions are available and, as the Master decided, more appropriate."

22. Second - the issues. Identify and, if there are several, label them (e.g. The Delay issue, The Prejudice issue, The Breach issue). If it is an appeal, say how the issues were decided below. Say why that was right or wrong. Note that frequently this can itself be the answer.

23. Third - The Facts. Never mis-state them. Integrity pays. Highlight the crucial ones. Keep to the absolute essentials and do not get bogged down with detail. In a case where a more detailed understanding of the facts is important, consider putting them in a separate schedule.

24. This is the part of the skeleton where you can usefully include cross-references to page numbers of key documents (but make sure that your bundles are paginated in the same way as the Judge's bundles!!) or relevant passages in witness statements. Help the Judge to identify the crucial documents which he needs to read before the case starts. He will bless you for it, especially when he has been presented with 18 lever arch files.

25. Fourth – The Law.

a. The key text of any vital statute.

b. The strongest cases at the highest level. Identify essential passages. As few as possible. If a short extract would usefully encapsulate the point you are seeking to make, you can put the quote in the body of the skeleton. Otherwise, add photocopies as appendices at the rear of the skeleton & highlight the key passages for the judge (see note below). Not too many!

Do not bother with citing trite law. If the law is not in issue, say so. Most

judges now welcome good photocopy authorities. NB 'good'. Only attach authorities which you need; and:

- Provide a paginated/flagged bundle (if you can agree one with your opponent so much the better);
- And an index
- If only a short passage from a long judgment is relied upon, you may copy only the headnote + the relevant page (checking that the passage cited is not qualified/explained elsewhere in the judgment)
- Do include (& deal in your Skeleton with) authority which is against you

NB in some cases you may find that the Skeleton is easier to read if, instead of having a separate section on the law, you make reference to it in the course of your submissions.

26. Fifth - Your Submissions. Apply the law to the facts point by point. Select the essential points. Only certain types of argument may be acceptable or available to you (e.g. where there is an appeal only on a question of law). Discard or relegate the weak points. Be candid.

27. Arrange the points in a recognizable order. Make your strongest point first and build on that (a building is more than a pile of bricks). Try to focus on the three best points, if there are as many as that: there is nothing worse than overload.

28. Be brief and to the point. Aim for simplicity in everything—concept, language, style, presentation. Concrete is preferable to abstract. If something seems unduly complex, divide and conquer: break it down. Less makes more impact than more. Use short sentences, short paragraphs, short submissions. That does not mean that the skeleton argument always has to be a short document: do not aim for succinctness at the expense of persuasiveness. If the Judge is likely to reserve judgment, he may welcome a document with a bit more flesh on it – but ensure that every sentence counts. There is no room

for mere “padding” or unnecessary verbiage. Ask yourself why you need that sentence, that paragraph, that phrase. If you cannot justify it, be ruthless and excise it.

29. Your case must make some sort of sense in terms of fairness, justice, practicality, principle, policy. It must be clear, coherent and logical. Your opponent’s case should make less sense than yours. Deal with your own case first. Then respond to his. This is an especially important lesson if you are the respondent to an appeal – do not forget that first time round, you had the judge or master on your side, which is a bonus, unless the judgment is an obvious nonsense, in which case don’t try to uphold the indefensible. If the judge got to the right result by the wrong route, be bold and say so.

30. Finally - your Conclusion. Say what order you want, so that the judge never has to ask "What are you asking for ?” Ideally the conclusion should flow naturally from the foregoing submissions. It should also reflect what you said in your Introduction.

31. DON’T FORGET TO SIGN AND DATE IT below your printed name, and then add your Chambers address.

ADD:
A Chronology as Appendix 1 (where necessary).
Key case(s) as Appendix 2.
Essential Reading List as Appendix 3 if the case papers are voluminous

BEFORE SENDING YOUR SKELETON ARGUMENT TO THE COURT

32. Check the skeleton through for spelling, grammar and formatting errors. Minor errors may create an unfortunate impression of sloppiness and set the Judge wondering whether the author has been equally cavalier with the content.

33. If there is time, draft the skeleton well in advance and come back to it and read it through after a break. In that way, you can evaluate the impression it is

likely to make on someone reading it for the first time, and make any small adjustments which may improve it.

34. Unless there really is no time to do so, always send a copy of the draft skeleton argument to your instructing solicitor and wait for his comments before lodging it with the Court. Two heads are generally better than one, and it is amazing how often the solicitor will come up with very good points that you will not have thought of, or will point out flaws in your argument or typing/grammatical errors which you have not spotted.

ORAL AND WRITTEN ARGUMENT- COMBINED EFFORT

Agenda

35. Check that the Court has received the skeleton argument – preferably before you get to court! Take spare copies with you in case it has got lost somewhere in the pipeline.

36. Use the written submission to identify for the court the ground to be covered and the shape of your case. It is a framework, not a sacred text.

The skeleton is not a script or substitute

37. Do NOT read out what the court has read or can read for itself. Do NOT say "It's all in my skeleton" and sit down.

Flexibility

38. The oral argument is a sequel to the written submission, not a repeat live performance (action replay) of the script. On your feet you have the chance to expand, clarify, emphasise, respond. Find out what the court is most concerned about, the difficulties it has identified and explore them with the court.

39. Be prepared to take the points in a different order from the way in which you have put them in your Skeleton.

40. If your opponent raises issues you have not thought of, or new points arise as a result of judicial intervention, be prepared to produce a supplemental Skeleton, if need be overnight.

Summation

41. Wrap up and then shut up. Towards the end of your oral submissions, have a quick (silent) run through the skeleton to check that you have covered all the points (including the hopeless ones which you should have kept off in oral argument).

COMMON FAILINGS – WHAT TO AVOID

42. The following is a list of the problems which arise all too often with written submissions:

    1. they are too long and detailed.
    2. there is no initial summary,sign post or lead-in.
    3. there is no clear framework in which to fit the detail of the facts and the law.
    4. there are too many issues/points.
    5. a neglect to relate the issues to one another.
    6. a lack of focus,organising structure or unifying theme
    7. excessive citation/quotation/boring reading out loud.
    8. misunderstanding or mis-statement of the facts,the law or of the opponent's case
    9. no clear, succinct statement of reasons for disposing of the case in the manner requested.

43. **One final and first thought. If you have ever had to write a judgment you will know that a skeleton which provides a reasoned and intelligible framework for a draft judgment is invaluable. Many a judgment has been handed down which owes its clarity and swiftness in delivery to a good**

skeleton argument. It is a good test when you have finished and before you hand it in, to look at the skeleton and ask yourself: "If I was giving judgment in this case, how can I use this to produce it?" If you follow the guidance in this paper, you will produce a skeleton argument which is a valuable aid to oral advocacy - and the bones will flesh themselves out, with luck, in a judgment.

Sir John Mummery
Sir James Hunt
Edmund Lawson QC