CAROLINE WEATHERILL MEMORIAL LECTURE 2022

Appellate Advocacy in the Staff of Government Division
Jeremy Storey KC
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It is a great honour to have been asked to deliver the 2022 Caroline Weatherill Memorial Lecture. My predecessors have included two Presidents of the UK Supreme Court, the Deputy President of the Supreme Court, the President of the Queen's Bench Division and the Bailiff of Jersey. As the first Manx judge to be invited, I am delighted to be given the opportunity to speak to you today.

The views I express are mine alone and are based on my experience as the Isle of Man Judge of Appeal for five years and as a Deemster for 18 years before that, as well as a Channel Islands Judge of Appeal for three years. Our new Judge of Appeal, Anthony Cross KC, will have his own ideas on appropriate directions and on how appeals should be prepared and conducted.

Looking round the room I can see many familiar faces, no doubt keen to ensure that their professional skills remain finely honed, but I hope that the other members of today's audience have come because they want to develop an appellate practice. Given there is currently no requirement to obtain permission to appeal to the Staff of Government Division, every litigation advocate could potentially face an appeal hearing at short notice so it would be wise to prepare now.

Appellate advocacy is different to that before the lower courts because of the hurdle in overturning a prior judicial decision and the restrictions that that entails. There are no witnesses save in highly exceptional circumstances, so no cross-examination skills are required. An appeal is a problem that needs to be solved and it is an advocate's role to help the SGD solve that problem in their client's favour. I hope that by the end of this lecture those of you who have already appeared before the SGD will feel more self-assured going forward and that the remainder will look forward to a new challenge with some confidence and maybe eager anticipation after what I hope will be a talk of real practical benefit.

I never had the pleasure of meeting Caroline Weatherill, a litigation advocate at Dickinson Cruickshank specialising in the field of personal injury. She never appeared before me in the 7 years I was sitting before her tragic death in 2006 shortly after the birth of twins. She was highly regarded by clients and colleagues alike. Lawrence and her 4 children can be proud of all she had achieved. Had she wished she might well have been a Deemster by now. To this day she remains a great loss to the Manx Bar.

Appellate advocacy comes in two parts: written and oral. In my experience poor oral advocacy can turn what seemed on the papers to be a promising case into a losing one. However, it is difficult to think of many appeals where poor written advocacy has won the day with an impressive oral performance. In other words, the Appeal Notice and skeleton arguments are key.

I begin with some personal bugbears.

Authorities

The Deemsters' Practice Direction of 11 August 2020 on citation of authorities could not be clearer yet it is honoured far more in the breach. There is no point in having the Manx Law Reports if they are ignored in favour of judgments copied from the internet. The headnotes and arguments of counsel can be useful and important. If cases from the adjacent Isle are to be cited then use the official Law Reports, if possible, rather than the Weekly Law Reports, the All England Law Reports or a Supreme Court transcript. Cite the Criminal Appeal Reports where available. Always mark the passages relied upon. This is required but rarely done. I prefer vertical lines in the margin to highlighting so that I can mark up the report myself.

Next, please do not duplicate authorities. If the Appellant exhibits *A v B*, the Respondent should not exhibit it again.

Where textbooks are relied upon always state the date of publication and the edition number.

Hard copy bundles

The Record of Proceedings need not replicate the bundling before the lower court. Apply some common sense to what is needed before the SGD. Sometimes we might have 30 bundles filed and no reference is made to 25 of them. I appreciate this means that the advocate responsible for conducting the appeal, likely to be the firm's highest fee-earner, must apply his or her mind to the bundling, rather than a paralegal, but the costs saved should justify this work.

Next, do not try to cram as many pages as physically possible into every lever-arch file. They are far too heavy and unwieldy with over 500 pages, so keep each file to a maximum of 350 pages. I prefer single-sided copies. Number each page and check every single number is legible. If the bundling has changed from the lower court each page should bear the original and new numbering. Either number consecutively throughout e.g. 1 – 700 across two files or A1 – 350 and B1 – 350. Another gripe of mine is the failure to show on the spine of every file what the internal pagination is, so please include on the spine label not just the number of the file, but what pages are included. That enables an advocate to refer to a page number without always having to inform the court which file it is to be found in.

Contemporaneous documents should be assembled in a logical, usually chronological, order. When compiling the index do not list individual contemporaneous documents.

Witness statements or affidavits with their own exhibits create a bundling issue. One solution is to include the exhibit and then duplicate some or all of it in the chronological run. That is far from ideal. The better way is to omit the exhibits entirely and to write against the relevant paragraph of the statement or affidavit the page references to the document or documents found elsewhere to allow the court to make the cross-reference.

Make sure all duplications are weeded out. Only include transcripts of evidence or submissions where this is essential. Even if a transcript of the entire hearing has been obtained it does not mean that it all has to be included in the appeal bundle. The costs may not be recoverable if unnecessary transcripts are included. In my experience they are often routinely included for most civil appeals and rarely of assistance.

A core bundle is only of assistance when the documentation is truly extensive. Where one is necessary do not give it unique pagination – include pages only with their main bundle pagination. Compile the core bundle in strict numerical order e.g. 2, 54, 101 …

Electronic bundles

This could merit a talk of its own. A summary of what is expected was set out by SGD in *Hermitage v Heda* on 6 September 2021 at [87]. Electronic bundles are of real use because appeals will rarely be conducted by only local judges. The preparation will therefore be done by at least one member of the court off-Island. If files have to be couriered they are often damaged en route and then have to be physically carried back to the Isle of Man by the poor judge or a fresh unmarked set will have to be used for the hearing.

If possible use a single PDF file, with pagination corresponding to the hard copy bundle. This will require the hard copy pagination to begin at 2 or higher to accommodate the electronic index page and possibly a prior title page. Some numbers will therefore be unused in the hard copy set to accommodate bookmarks.

Each electronic authority should be filed as a PDF copy of the original report with headnote or, if unavailable, the internet version.

Appeal Notices

First, know the relevant timetable for filing. Common mistakes are filing appeals against conviction within 28 days of a later sentence or filing appeals against an order which is not 'final' within six weeks of the order.

If you are out of time then file your application for an extension of time at the same time as your Appeal Notice with any relevant evidence as to the reasons for missing the deadline. Do not wait until the first directions hearing. The sooner you apply the better the prospects.

There is a tendency to file on the final or penultimate day. This seems puzzling to me. The first instance decision will probably have been provided in draft so by the time it is handed down you will be likely to know if an appeal is to be pursued. The earlier you draft the Appeal Notice the easier it is because you are closer to the judgment in time and should be on top of the case. As the Appellant you will want the earliest possible hearing date so file as soon as you can. More importantly, if you are seeking a stay pending appeal or an expedited hearing in an appeal against sentence, the earlier you file the better your chances. Bail pending appeal is almost certainly going to be denied (I never granted it once for the reasons stated in *Madden v AG* 31 December 2021).

If new evidence is to be adduced apply as early as possible, even if the new evidence is not yet available, and file your witness statement and/or submissions in support.

Spend time on your grounds of appeal. Permission is needed to amend them or to add to them and may not be given. The stronger the grounds the better the chance of a settlement. You do not have to include them on the pro-forma Appeal Notice. You can attach them as a separate document.

Confine your grounds to the fundamental issues and concentrate on your best point. Do not include barely arguable points or points not worthy of the court's attention as you will forfeit the court's trust and only annoy the Tribunal. This may impact on your better grounds. So

confine your grounds to those with a reasonable prospect of success. When you have finished drafting: edit, edit, edit and consolidate overlapping or repetitive grounds.

Does the Respondent need to cross-appeal? If so, know the time limits which are the same as for Appeal Notices. Does the Respondent really need to serve a Respondent's Notice to uphold the judge's decision for different or additional reasons? This can often be a tactical decision because service of one might be seen as an acceptance that the judgment is weak and far from 'appeal proof'.

You do not need to appeal a costs decision unless it is your case that even if the appeal is dismissed the costs decision cannot stand because it was outside the Deemster's discretion.

Skeletons

Skeletons are not supposed to be US Supreme Court Briefs. They are intended to summarise the arguments, to assist the court to better understand each party's contentions before the hearing, to enhance the utility of oral argument and to shorten the hearing by ensuring the real issues are understood by the parties and the court beforehand. State concisely those grounds of appeal being argued and those, if any, being abandoned. Identify the flaws in the judgment below and any procedural errors made by the court below and the basis in principle or authority for that contention. On a recent appeal neither counsel even referred to the judgment below in their oral addresses but this has to be the foundation of the Appellant's submissions. If a finding of fact is challenged on the basis no reasonable Tribunal could properly have made such finding or if the absence of a factual finding is one that no reasonable Tribunal could properly have omitted to make, then refer to the precise finding (or its absence) and to the underlying evidence (written or oral) to support your contention. Set out the precise error of law relied upon and the basis in principle or authority for that contention.

A Respondent's skeleton argument must indicate what part, if any, of the Appellant's skeleton argument is accepted and what is contested. So do not repeat matters set out in the Appellant's skeleton argument which are not contested. Summarise the Appellant's arguments and the Respondent's answers to such arguments, referring to the Appellant's authorities and any of your own and to the facts relied upon by the Appellant and those additional facts relied upon by the Respondent.

Observe the KISS principle: Keep it Simple and Succinct. The skeleton must disclose clearly the lines of argument. Those lines should not be obscured by thickets of dense prose, interesting but ultimately irrelevant asides, or gratuitous kicks in the direction of the opposition. Remember that at the end of the hearing the judges must prepare the judgment, often a few weeks later. Judges can change their views when reflecting after the hearing and discussing the appeal. So the aim of a skeleton should be to guide the draftsman of the judgment to the result you contend for and for the reasons you rely upon. Put yourself in the shoes of the judgment writer. Has the judgment below been fairly and adequately summarised? What are the issues for the SGD to resolve? What are the key facts and, if relevant, the procedural history? How can the judgment below be criticised or supported and why? In other words, do everything in your power to make the task of the SGD easier. Draft your submissions with a view to convincing the reader that your arguments are the stronger. Make it easy for the judges to find the right answer to the problem the appeal poses – the answer that favours your client.

As any appeal must be against a decision embodied in an order, check that an order has been made by the lower court following judgment, conviction or sentence and, if not, request it immediately.

There is a tendency in the Isle of Man for skeleton arguments to be much fuller than appropriate, maybe because they are often drafted, at least in part, by lawyers different to those doing the oral advocacy. Looking back I wish I had made more directions limiting the length of skeleton arguments. Where they are unreasonably long you run the risk of the court requiring the re-filing of a shorter skeleton and a possible adjournment of the hearing at the advocates' expense.

Prepare the skeleton as a searchable Word document in not less than 12 point font with not less than 1.5 spacing. That includes footnotes. The Judges' eyesight might not be as good as yours. Cross-reference the skeleton to the Record of Proceedings and use hyperlinks when electronic bundling has been utilised. Ideally there should be a single PDF containing all skeletons, excluding authorities, statutes, Rules or textbook citations so the Respondent's skeleton will not start at page 1.

Now the practicalities. Do not cite more than one authority for a single proposition. Do not include lengthy quotes from authorities – the judges can be trusted to turn up the passage you rely on. Do not quote lengthy extracts from the transcripts for the same reason. When the document is ready for filing: date it and always give the name or names of those who prepared it.

If you are going to miss the date directed for filing then apply as early as possible for an extension of time, using the appropriate court form, not by letter or email. Any unjustified delay likely to jeopardise the hearing date may result in adverse costs orders and an adjournment.

<u>Oral advocacy</u>

Advocacy or persuasion involves creating or changing perceptions to influence the result. According to the renowned Australian barrister, academic and judge Professor George Hampel, great advocates are not necessarily better lawyers than others but they are better communicators. The need for advocates to be able to communicate complex ideas and arguments persuasively will always remain the touchstone by which an advocate is judged. So do not mumble. Making judges strain to hear you in a large courtroom is not good advocacy.

There is no single objectively correct style. Advocates have their individual styles which reflect their personalities and characters, their family upbringing, their education, training, experience in life as well as in the law, and intangible evidence such as appearance, voice timbre, skills in eye contact, sense of drama and humour. What impresses me may not impress my fellow judges. Chief Justice of Australia Sir Anthony Mason said *"Persuasion calls not only for mastery of the materials but also an element of constructive imagination and boldness of approach".* It is all too easy for those on the Bench to forget the stresses and pressures imposed on advocates, but appeal judges were advocates once. They recognise chicanery, flattery, insincerity and filibustering. Everyone has good and bad days but the object should be to maximise the former and minimise the latter. Very occasionally there is a temptation to begin a judgment with the words *"Despite everything that has been said and written on behalf of the Appellant by his counsel, we are of the opinion that the appeal should be allowed".*

A common mistake of some advocates at the hearing is to simply read out a paragraph of the written submissions. This is not advocacy. Some counsel often think that by simply making their points they will persuade the court. This is false. Construct your oral arguments on the basis that the judges have read and understood your written submissions. But never assume the judges will have your knowledge of the detail. It is not therefore necessary to begin with a ritual incantation of the history of the litigation. The court will be aware of it from the judgment below and/or your skeleton argument. So better to begin with a statement of the issues. Your job is to pick up and expound the critical points instead of trudging through the written submissions paragraph by paragraph. Identify as quickly as possible the perceived flaw or flaws in the judgment below – the sooner you can make the court believe that 'something has gone wrong' the more likely you are to succeed. Illustrate the adverse consequences of those flaws. There is nothing worse than an advocate, like the typical litigant-in-person, simply raising every conceivable grievance in respect of the hearing below, in a completely undisciplined way. It seems the hope is that, somewhere in that dog's breakfast, there may be a winning point. Appeals are not of course re-runs of the hearing below and advocates who treat an appeal as if it is lose all credibility.

Anything you can do to make the appeal appear to be important or even entertaining the better. Judges like to be entertained because such is rare and they like to think that the work they do is important. The hearing is your one and only opportunity to capture the attention of the court. You have a chance to look at the judges and see whether you are getting your point across and to watch their expressions and level of attention – if any.

Where there have been no responsive written submissions from the Appellant then the oral hearing is the only opportunity the Appellant's counsel has to demolish the Respondent's skeleton argument. So take time to deconstruct the Respondent's arguments and explain why they are mistaken.

Begin with your best argument unless there are good reasons, tactical or otherwise, for not doing so. Occasionally it is logical to begin with an argument that is not as strong as a later argument. But tell the Tribunal that it is the later argument that reflects the real thrust of your case.

Now the practicalities. First, know your Tribunal. What is unusual about the SGD and atypical of Courts of Appeal generally is that you know the identity of at least one member of the court from the outset. Only rarely will the Judge of Appeal not be presiding. You should (or soon will) know from previous decisions of Judge of Appeal Cross how he views certain issues or arguments and so you can prepare accordingly. Similarly, check the cause list before you draft your skeleton argument to learn the identity of the other judge or judges on your court and plan accordingly.

Second, prepare fully. Although you were most familiar with the case at the time of the hearing before the lower court that may be months ago and so do not assume you can remember the detail. Master the judgment below inside out. Know where all the key documents are and re-familiarise yourself with them. The same goes for the evidence below, both written and oral.

You must first know all the relevant procedural rules including the nature of the appeal and the scope of review. Never forget it is a review not a re-hearing. What are the powers of the SGD? What precise orders are you seeking? If the appeal is to be allowed what is to happen about the orders made below? What orders are to be set aside? Are any orders to be made in their place? If the appeal is based on an improper exercise in discretion so that the SGD

can re-exercise that discretion, how should that now be exercised and why? Is anything to be remitted and, if so, exactly what and to whom, the original or a new Deemster and why?

Once you are a master of the facts, know the relevant law. Review the authorities cited below and discussed in the skeletons and check whether there is anything new. Then re-check that the issues have been correctly identified in your skeleton. Be clear in the line or lines of reasoning which are proposed with respect to each issue.

Oral argument is not designed to be a further opportunity to present the written submissions, so do not try to re-state the skeleton in a slightly different way. Use the opportunity to compliment and strengthen your written submissions. Some of the skeleton may not need oral elaboration. Just because a point may be ignored at the hearing does not mean the court will lose sight of it. So focus on what matters in order to succeed on the appeal. Ditch what is inessential to your argument. Do not overstate your case. It may impress your lay or professional clients, it won't impress the court. Reflect upon the case as a landscape of fact and law through which you propose to take the court. Be able to move to any point of the landscape under questioning without losing track of the main road. Look to your assumptions or premises, particularly those which, if falsified, would place an impossible obstacle in your chosen path. Alternative routes should be mapped.

When citing authority remember the court may have done no more than read the passage relied upon in your skeleton. So begin with 'the case of *X v Y* is authority for the proposition that …' and then go to the headnote (where there is one). If not, summarise what the case is about and what it decided. Only rely on authority if it is clearly in your favour. If the authority can be read as an authority against your argument, don't use it. Or if there is a passage elsewhere in the authority which damages your case, don't use it (unless you are obliged to).

Try not to exhaust the judge's patience so take the hint and move on when a point is not being received receptively. There is merit in brevity. And be aware of the time for which the appeal is listed. The vast majority of appeals against sentence or civil appeals against interlocutory orders are listed for half a day and for appeals against conviction or civil appeals from final orders one day is usually allowed. Only the most complex appeals will be listed for longer. In 1948 an appeal to the Privy Council, not from the Isle of Man I hasten to add, was listed for 36 days of argument (*Commonwealth v Bank of New South Wales* [1950] AC 235) and two of their Lordships perished in the course of proceedings – whether through boredom or other causes is unknown. If a day has been allotted then the Appellant should assume that he or she will only have about 2½ hours to address the court, excluding the Reply. Know when to sit down and have the courage to do so.

Concessions

Be willing to make concessions after receipt of the Respondent's skeleton argument or as a result of questioning from the Bench. This is not just fair play – it is a weapon of advocacy, because it shows the Tribunal you can be trusted when it comes to your main argument. Similarly, if you have mis-stated the facts or the law, admit the error immediately and correct the matter. Even if mis-statements are not deliberate the danger is that judges may think they are. The judiciary respect advocates who work hard, give of their best, are ethical and courteous and who thoroughly prepare their cases. We will forgive most honest mistakes if you meet these criteria.

Questions from the Bench

The outcome of a case may often hinge on questions from the Bench and the answers given to them. So it is vital to anticipate what the questions might be and how they are best answered to suit the case you are presenting. If a question is unexpected and you are not able to answer it immediately, then suggest you deal with it after the next break, maybe stating it is an important question and you want to give it more thought. Or you might say the question is best answered when you come to another of your submissions. The advantage of questions is that it gives you the only real clue as to what the questioner is thinking, how he or she is leaning and what may be troubling the judge. It is therefore a golden opportunity to clarify and explain your case. Even arguments that are designed to show up a weakness in the case present an opportunity to enter into a dialogue with the judge.

If the Tribunal refers to an authority unknown to you do not pretend you know it. Simply say you will take the opportunity to read it over the next break. Otherwise you run the risk of the judge asking you what the case decided.

Errors by the Tribunal

Sometimes a member of the court may suggest a proposition to you which you know is fallacious. It is of course tempting to seize on the judge's point, agree wholeheartedly and move on. This would be a grave mistake. Much better to tactfully point out why you think the judge may be mistaken. You do not want to win the appeal, only to be faced with a further appeal to the Privy Council.

The Reply

Use any right of reply sparingly. Do not embark on new matters but address only those arguments raised by your opponent (or by the Tribunal during those oral submissions). Correct any errors or misapprehensions. Better not to reply at all than make a reply not worth making.

Conclusion

In conclusion, the joys of appellate advocacy when the tasks have been well and skilfully performed, particularly of course when crowned with success, can be greater than most other vocations can offer – a heady mix of intellect, emotion and drama – sure to get the adrenalin flowing. I would say that the challenges of appellate advocacy are much greater today than when I started off in practice 50 years ago and no doubt those challenges will increase further over the next 50 years.