APPEALS IN PERSONAL INJURY CASES

Presented to Trial Lawyers Association of BC

Personal Injury Trial Tactics & Tribulations

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APPEALS IN PERSONAL INJURY CASES

I. Introduction

Appeal hearings can be intimidating but also exhilarating. There is nothing quite like being peppered with questions from three (or nine) astute judges. Unlike trials, the appellate court will come to the hearing with a significant understanding of the case. Indeed the judges will have formed views already on the outcome. The first few questions or comments by the bench will often reveal where some of the judges, or even the entire panel, is leaning. It can be quite a dispiriting feeling as you begin to realize you have lost even before you opened your mouth. On the other hand, it can be incredibly rewarding as you begin to feel the momentum shifting in your favour.

My purpose here is to offer some guidance and insight on how to conduct (or defend) an appeal from a judgment in a personal injury case.

II. The Decision to Launch an Appeal

A. Practical Considerations

One of the first considerations whether to launch an appeal is the cost relative to the potential benefit.

Appeals are not that terribly expensive (compared to trials). The most costly disbursements will be the trial transcripts and the appeal books. The transcripts typically cost about $600 per day of trial. Depending on how long the trial was, the cost often is not as prohibitive as you may think. For example, for a recent appeal from a judgment following a five day trial, the cost of the transcripts was just under $3,000 and the appeal books were about $2,600.

While factums take a long time to prepare, the appeal hearing itself, will typically only be either a half day or one full day, even for an appeal from a lengthy trial.

The Court of Appeal's tariff of costs is rather low and in need updating. At present, most appeals wind up with an award of scale 1 costs which amounts to only $60 a unit (compared to $110 a unit on most Supreme Court bills of costs). Thus if you are an unsuccessful appellant after a typical one day hearing, you may end up only owing the respondent about $5,000 to $6,000 in costs.

Of course, the converse is your client will only recover a modest amount when successful.

An important issue you must consider at the outset is the remedy you will seek from the Court of Appeal. In some cases you may ask the court to vary a damages award. In other cases, however, the trial judge may not have made sufficient factual findings to allow the Court of Appeal to vary the award. In that case your only remedy, if successful, may be a new trial. You will need to have a frank conversation to determine if your client will be up for a second trial, before you launch headlong into an appeal.

B. Legal Considerations

The legal analysis regarding whether to appeal requires more than simply finding some error or errors in the judgment.

One has to ask two main questions:

1. Is there an error in reasoning that is material to the result and falls within the scope of review of the Court of Appeal? or
2. Did the trial judge make a palpable and overriding factual error that is material to the result?

Patrick Foy, who has taught many CLEs on this subject says in The Factum in Civil Appeals, CLEBC March 2006:

The question whether an error has affected the result can take different forms:

(1) Were the findings of fact supported by the evidence?

(2) Were the inferences drawn proper?

(3) Was the correct law applied?

(4) Assuming error in fact or law, would the result have been different?

Appeals from jury awards require very different considerations. Most appeals from jury awards will focus on an error in the instructions the trial judge gave the jury. Alternatively one may focus on some procedural unfairness or erroneous evidentiary ruling that may have influenced the jury and the result. In jury appeals, however, one will also have to consider whether a failure by trial counsel to object to a particular ruling or instruction may be fatal to the appeal. Because appeals from jury awards involve unique considerations they will have to be addressed on another occasion. This paper will deal exclusively with appeals from trials where a judge sat alone.

A consideration that often arises in appeals from personal injury awards is whether the award made was inordinately low (or, if you were the defendant at trial, if it was inordinately high). This is, in fact, simply an extension of the "palpable and overriding error" test: *Jarmson v. Jacobsen* 2013 BCCA 25; *Schenker v. Scott* 2014 BCCA 203.

(1) Is there an error?

The Court of Appeal is a court of error, and an appeal is not a re-hearing of the case. You must demonstrate that the trial judge committed a reviewable error. Some counsel approach an appeal in the same manner as the argument at trial, convinced that the trial judge ought to have

accepted the argument the first time. This is a mistake. It will not be effective to just present the same argument as you did at trial.

The starting point is to identify an error or errors in the judge's reasoning.

(2) Was the error material to the result?

While an error in reasoning is essential to succeed on an appeal, the error must be linked in a material way to the order which was made. If there was an error which had no apparent effect on the outcome of the judgment, an appeal is unlikely to succeed. As one American justice put it:

> *"The court erred in some of the legal propositions announced to the jury; but all the errors were harmless. Wrong decisions which do not put the traveller out of his way, furnish no reasons for repeating the journey."*
>
> *Cherry v. Davis,* 59 Ga. 454, 456 (1877) (Bleckley J.), quoted in A.B. Rosenberg, M.J. Huberman, *Appellate Advocacy* (Carswell, 1996) at 69.

Even though the trial judge may have misstated a legal principle you must still demonstrate that the error affected the result.

An appeal from an alleged factual error is often thought to be difficult because the standard of review is considered so high.

The test the Court of Appeal will apply is whether the trial judge committed a *"palpable and overriding error"* in determining the facts. In *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33, the Supreme Court of Canada described it this way:

> *"5 What is palpable error? The New Oxford Dictionary of English (1998) defines "palpable" as "clear to the mind or plain to see" (p. 1337). The Cambridge International Dictionary of English (1996) describes it as "so obvious that it can easily be seen or known" (p. 1020). The Random House Dictionary of the English Language (2nd ed. 1987) defines it as "readily or plainly seen" (p. 1399).*
>
> *6 The common element in each of these definitions is that palpable is plainly seen."*

This is a tough, but not impossible, test for an appellant to meet. For example, you may be able to demonstrate that the evidentiary record clearly and plainly establishes the plaintiff missed six weeks of work due to accident related injuries. If the trial judge made no award for

loss of earnings you could probably demonstrate this was a palpable and overriding error. The factual findings by the trial judge must be supported by some evidence (or at the very least the trial judge would have to make a finding that the evidence was not satisfactory and therefore the plaintiff did not meet the burden of proof). It is not uncommon for trial judges to overlook some evidence or mistakenly recall the evidence. That is one of the reasons we have appellate courts.

As noted above a common issue in personal injury appeals concerns whether the award was inordinately low or inordinately high. The leading case on the subject is *Nance v. British Columbia Electric Railway*, [1951] A.C. 601, where the court said:

> *"... Whether the assessment of damages be by a judge or a jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then, before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (Flint v. Lovell, [1935] 1 K.B. 354, approved by the House of Lords in Davies v. Powell Duffryn Associated Collieries, Ld., [1942] A.C. 601)."*

While this is also a difficult test it is not impossible to meet. For example, in *Heppner v. Schmand* 1998 CanLII 5201, the plaintiff was 50 years of age at the time of the accident. The trial judge awarded her past earnings loss of $65,000 and future loss of earning capacity of $45,000.

The Court of Appeal set aside the award for loss of future earning capacity and increased it to $90,000. In doing so the Court said:

> *"[13] Considering the trial judge was dealing with at least a ten-year period and bearing in mind that the $65,000 award for past wage loss covered a five-year period, an appropriate award would indeed have been considerably greater….(T)he award for loss of future income should bear some relationship to the past wage loss award. It is my opinion that in these circumstances it is totally inconsistent to have made an award of $45,000."*

As counsel you have to be realistic concerning the chances of success on a "factual appeal" but at the same time you should not be completely deterred from pursuing such an appeal.

II. Factums

A. The Appellant

Once you have identified the error or errors and decided to appeal the most important step of all is preparation of the factum.

Justice Charron prepared a list of eight ways for a party to lose in the Court of Appeal. The fifth way is, "to prepare a lousy factum and hold your brilliance for oral argument": (2003), 61 The Advocate 148.

Justice Laskin in View From the Other Side: What I Would Have Done Differently if I Knew Then What I Know Now (1998), Advocates' Soc. J. No.2, 16 says: "when in practice I used to work pretty hard on my own factums. Now that I am on the other side, however, I can tell all of you that if I knew then what I know now, I would have worked about ten times as hard on my factums."

B. The Opening Statement

It is useful to consider this question before beginning to write the factum: What is this appeal all about? Our Rules compel counsel to address this question at the outset. Form 10 of the Rules requires an opening statement and has these directions:

> *"The opening statement must be a concise statement of the nature of the appeal and must not exceed one page.*
>
> *The opening paragraph of an appellant's factum must be a concise statement of the nature of the appeal."*

Former Chief Justice MacEachern had issued a practice directive (since repealed) that said the opening statement should answer the question: "what is this appeal all about?"

Laskin J.A., supra, says:

> *"First, before you write a single word put yourself in the position of your reader, the judge. This is what the great John Davis of the New York Bar called "the cardinal rule" of advocacy. In your imagination, trade places with the judge. You are immersed in the case, the judge knows nothing of it. What is this appeal all about? What is the key issue on which the appeal turns? Identify and frame this key issue, the issue that will control the outcome of the appeal. Then think about the story that you are going to tell around this key issue. How would you want this story told?*

What approach will help the court reach the best solution?

Second, appeals generally fall into one of two categories: error correcting or jurisprudential. Decide into which category your appeal falls. Most appeals are simple error-correcting appeals. Do not make the mistake of trying to turn your error-correcting appeal into the next *Donoghue v. Stevenson.*"

Writing an opening statement that answers the question "what is this appeal all about" will force you to focus your factum and all your arguments. You should constantly refer back to the opening statement as you work on the factum.

C. Point First Writing

Laskin J.A. is also a proponent of "point first writing". In Forget the Wind-Up and Make the Pitch: Some Suggestions for Writing More Persuasive Factums he says the following:

> *"…(S)tate your point or proposition before you develop or discuss it. Do not write your factum like a mystery novel in which the conclusion is revealed only in the final paragraph, if at all. In other words, give the context before discussing the details. Indeed, point first writing puts into practice the principle of context before details. Point first writing should be used throughout your factum, both in the facts part and in the law part, and within those parts, in every section and in every paragraph. Whenever you are about to dump detail on the reader, give the reader the point of the detail first.*
>
> *We see far too many factums that contain long meandering paragraphs, in which the point of each paragraph is never stated, or almost as bad, is stated three paragraphs later. This is not reader-friendly advocacy. You can fix this problem in these ways. At the beginning of the paragraph, tell the reader what topic or idea you are going to discuss in the rest of the paragraph. Try to restrict each paragraph to one main idea or topic. Then, in the first sentence or two of each paragraph, articulate the point of the paragraph, usually your conclusion or submission on the issue. The remainder of the paragraph will discuss the submission, elaborate on it, support it, or qualify it. This is point first writing."*

A factum from a trial where the trial judge overlooked or misunderstood certain evidence or misstated a legal principle, will focus on the error alleged to have been made and why that error was significant. The factum for an appeal where there are conflicting lines of authority may be much more academic in nature. Sometimes you may need to address the policy implications of your argument. The court may want to know how that argument, if adopted, will affect not just the case at bar, but also future cases. But most appeals will not be precedent setting cases, requiring an exhaustive review of the authorities. You need to decide what kind of appeal you have and write the factum accordingly.

Structuring the factum with headings that guide the reader can be used to great effect. Headings are part of the argument and can aid point first writing. They should be strategically drafted.

In Form 10 there are completion instructions for your factum. The word "concise" appears seven times in the set of instructions (and the word “brief” once for a total of 8 such admonitions). Moreover, Rule 22(2) states a factum must not:

(a) contain irrelevant material, or

(b) reproduce any matter that is contained in the appeal book or transcript, if reference to the material or matter will reasonably suffice.

The rules state your factum must be no more than 30 pages in length. If a factum is written concisely there should be no need to exceed 30 pages in most cases. It is certainly possible to prepare factums that are less than half that length.

Concise writing is an elementary rule of composition. Strunk & White, in The Elements of Style, command: "Omit needless words." They explain:

> *“Vigorous writing is concise. A sentence should contain no unnecessary words, a paragraph no unnecessary sentences, for the same reason that a drawing should have no unnecessary lines and a machine no unnecessary parts. This requires not that the writer make all his sentences short, or that he avoid all detail and treat his subjects only in outline, but that every word tell.”*

Make an effort to keep sentences (and paragraphs) as concise as possible. It takes longer to write crisp concise sentences than it does to write long meandering ones.

You must also, of course, ensure that your factum complies with the rules of court. A factum should, to the greatest extent possible, be a self-contained or "turn key" document. Your judges should know what the case is about, what issues are being raised, and the factual context in which the issues arise. Your factum should identify the key evidence and factual findings. Do not expect the reader to go away to read the transcripts, the other party’s factum and the reasons for judgment in order to understand your factum. While you need to note where key evidence can be found, the reader should be able to understand your factum without reading any other documents.

D. The Factum Structure

i. The Statement of Facts

Most appeals are decided on the facts. Most of your time should be spent drafting them. As one advocate put it, *"...the task is to present the facts, without the slightest sacrifice of accuracy, but yet in such a way as to squeeze from them the last drop of advantage to your case."* The facts should tell a complete story of the important events in the case. They should entertain where possible. They should bring the case to life in the mind of the reader. Above all, the facts should paint a picture which motivates the court to resolve the case in your favour. Courts are powerfully motivated by the equities of a case. As Justice Laskin put it:

> *"...advocacy...reduces to two propositions. First tell the court why your client should win -capture the "moral high ground" – and then tell the court how to get there. The first proposition turns on how you present the facts; the second, on how you present the law."*

There are two common mistakes made with the facts. At one extreme are factums where the facts are nothing more than a boring recital of the evidence and reasons for judgment. At the other extreme are factums where the facts are not presented honestly and candidly and full of spin. Occasionally counsel may try to pass off disputed evidence, rejected by the trial judge, as facts.

Counsel who in the boring recital camp, probably make the mistake of thinking of the facts as distinct from the argument. The statement of facts is, however, very much part of the argument. In a lecture given on the topic of appellate advocacy, John W. Davis made the point this way:

> *"...it cannot be too often emphasized that in an appellate court the statement of facts is not merely a part of the argument, it is more often than not the argument itself. A case well stated is a case far more than half argued."*

This is not to suggest that you should use the "Statement of Facts" to editorialize. The court wants the facts of the case, not inferences stated as fact, or counsel's opinion about what the facts individually or collectively add up to. But facts can be presented fairly and dispassionately, while at the same time arranged in such a way as to support different and competing perspectives in relation to the same events. Even when the trial judge has made

certain factual findings, it is often possible to state those facts in way that is favourable to your argument. It is the task of the appellate advocate is to turn a fact to your advantage, while doing so accurately and fairly.

As mentioned, at the other extreme are counsel who play loose with the facts. It has been said there is one cardinal rule, incapable of being bent, and it is this: the facts must be stated accurately. You stand to lose all credibility with the court if you do not state the facts accurately. No matter how unfavourable the facts are they will hurt a great deal more if the court learns of them for the first time from opposing counsel.

Where possible, rely upon the findings of fact made by the learned trial judge. Distinguish agreed facts, disputed facts or facts based on testimony qualified in cross-examination. Use the terminology of the record to state the facts. This does not mean your factum should include strings of quotations; rather that every fact must be accurate and supported by the record.

Accurate transcript references (to volume, page and line number) should be provided in support of each paragraph in the statement of facts.

ii. **The Issues**

When framing the issue, the task is to state the issue or issues in such a way that, if it is accepted as a proper formulation, the case is likely to be resolved in your favour. In other words, the issue should guide the reader to the desired result.

Fitch, G (now Mr. Justice Fitch) in Writing a Persuasive Factum, CLEBC Oct. 2010, offers this example from *Regina v. Ho.* In *Ho,* counsel brought a *"Rowbotham"* application seeking to have himself appointed to act at trial. Counsel also made it clear that he would not agree to act for legal aid rates. The trial judge made the appointment and ordered the Crown to negotiate a fee arrangement acceptable to this counsel. When no agreement was reached, the charges were stayed. The Crown appealed. Counsel for the Appellant framed the issue this way:

> *The issue on this appeal is whether the state becomes disentitled to conduct a prosecution when it declines to provide funding to enable an indigent accused to retain his or her counsel of choice, at a rate of remuneration acceptable to that counsel.*

The question was framed in such a way as to suggest that the only reasonable answer was the one sought by the appellant. The real issue, then, becomes not the answer to this question (which the appellant's counsel hopes is obvious) but, rather, whether the court will find the question to be a fair and accurate formulation of the issue on appeal.

As a rule of thumb, no more than four or five issues (and preferably fewer) should be stated on any one appeal. The strongest grounds should be stated first. It has been said, if the court is unpersuaded by your five best arguments, it is unlikely that the sixth would have carried the day.

Counsel must identify the strong points and abandon the weak ones. Identifying a host of errors by the trial judge can be tempting. Sometimes counsel are frustrated by the trial result or they believe the Court of Appeal will see numerous errors by the trial judge and feel sympathy for the appellant. Avoid this temptation. It is difficult enough to convince the Court of Appeal that a trial judge has made one or two errors, let alone eight or nine. When faced with a cumulation of lesser points the Court will most often decide none is substantive. Keep the number of errors alleged to a minimum; two or three is considered the maximum. Put the strongest first.

The issue controls the factum. The facts should raise the error, the argument resolve it. For this reason, a clear understanding of the alleged error is necessary before anything else is written.

As appellant, do not allege error in the form of a question; state positively, *"The learned trial judge erred..."*

iii. **The Argument**

As the factum has increased in importance, written argument of the issues has become much more detailed. Nothing, or next to nothing, should be "saved" for oral argument.

When drafting the factum, counsel must constantly keep in mind the standard of review applicable to the ground being advanced.

Argument in support of each of the issues stated should lead off with a positive assertion of how the trial judge erred. The assertion should, in succinct terms, focus the attention of the judge on the precise ground being raised. This will enable the judge to

read the rest of the argument offered in support of the ground with knowledge of where it is heading.

There are different schools of thought about the number of cases that should be cited in support of a legal proposition. Different circumstances will call for different approaches. As a general rule, however, counsel should strive to limit their case references to the greatest extent possible.

Move from one proposition to the next in an orderly, logical and compelling manner. Choose the simple over the ingenious, the direct over the circuitous, and the easy to comprehend over the difficult. Introduce new points with a heading and include those headings in the index. Refer to the page and line of the record to support all facts.

The factum should be easy to read and easy to understand.

Consider closing your argument with a carefully worded and powerfully presented conclusion. A well-crafted conclusion can leave the court with a very positive impression of the argument as a whole.

iv. Nature of Order Sought

The final part of the factum, Part IV, is where counsel sets out the nature of the order sought on the appeal. Normally, the appellant will simply ask that the appeal be allowed with costs, but counsel should not rush too quickly through this part of the factum. Consider if there is some specific relief you need, and if so, ask for it. Don't forget to ask for costs in the court below.

In this part you need to turn your mind to what precisely do you want the court to do. In a personal injury appeal, you may ask the court to vary the damages award. If, however, there are not sufficient factual findings to allow the Court of Appeal to vary the award, you may have to request a new trial.

E. THE RESPONDENT'S FACTUM

Some special considerations arise with the factum prepared by a respondent.

The respondent’s factum should be a stand-alone document. When the judge reads the factum he or she may not read it together with the appellant’s factum. The reader should be able to understand the respondent’s argument without referencing back and forth to the appellant’s factum or the reasons for judgment.

Therefore, do not say something like *"As to paragraph 11 of the appellant's factum, it is submitted that ...".* It is far better to say, *"In paragraph 11 of its factum, ICBC contends that the trial judge misinterpreted s.72(2) of regulations to the Insurance (Vehicle) Act. Mr. Jones submits the trial judge did not misinterpret this section. The trial judge..."*. Moreover, cross- referencing to the appellant's factum allows the appellant to control the presentation of the case.

The respondent should state which facts set out by the appellant he or she does not dispute. If appropriate, a simple statement that the respondent does not take issue with any of the facts, will be appreciated by the court and lends credibility to the respondent's factum.

The respondent should state his or her position with respect to the facts that are disputed. The respondent should state additional facts considered relevant which are not included in the appellant's statement of facts.

A difficult issue is how to best respond to the issues raised by the appellant. The form to the rules states:

> *"Part 2 - …In the respondent's factum, this part must be titled "Issues on Appeal" and must consist of a statement of the respondent's position in regard to the points put in issue by the appellant's factum and of any other points that the respondent may properly put in issue."*

The respondent should briefly state his position with respect to each of the issues raised by the appellant and each should be answered in the negative. On the other hand, if the respondent does not agree with the issues as framed by the appellant, he should not hesitate to say so. You may say something like: *"The respondent says that on a proper analysis, the question at issue is as follows..."* Then frame your own question.

The form seems to suggest the respondent in Part 3 must meet the appellant's points in the order presented and then outline the respondent's arguments. If the appellant has put the strongest point first, this means the respondent's most vulnerable point will also come first. As the respondent you will undoubtedly want to put your strongest point first. You should only do this, however, if the issue would be determinative of the appeal. Otherwise, the respondent usually ought to follow the appellant's order.

Do not snipe at opposing counsel in the factum. Do not characterize the argument of opposing counsel as *"without merit".* It is disrespectful and poor advocacy.

As the respondent, it is often best to develop your argument by relying on the reasons in the court below. Do not, however, extensively recite the reasons. The court will have read the reasons for judgment.

IV. Oral Argument

Oral argument should not be a repetition of the factum. Instead look at it as an opportunity to communicate orally the argument you wish to advance.

While the structure of the oral argument will vary with the case, you should always hit your main point as quickly as you can.

The Court of Appeal prefers that counsel follow the order of the factum. If you prepare your argument in a notebook, make sure you include factum references so you can tell the Court where you are in your factum so they can follow along.

The beginning of the argument should be carefully prepared. You will want to put forth a clear statement of the issue raised on the appeal. Whether it is the first thing you say or the second or third will depend on how you want to structure your opening, but be sure you have identified the key issue very early on.

It is often helpful for counsel to outline the submissions you will make. It will assist the Court in understanding where your argument is going, which also assists the Court in understanding why they are hearing a particular submission. If the Court asks you why you are telling them something, it is an indication that you have not explained where you are going and how you propose to get there.

If you can, avoid reading from the evidence or reasons for judgment. Counsel's summary of an excerpt is preferred to a reading of it. Do not hesitate, though, to recite a critical line from the evidence or the judgment below, if necessary.

It is imperative that counsel consider what problems and questions may arise during oral argument. It will be rare when you can think of a clever and astute answer on your feet. You should assume you will be asked the toughest question you can think of and you need to decide how you will respond to that question when asked.

John W. Davis, a prominent American counsel practising in the 1940's, recommended that appellate counsel *"change places with the court"* in order to step back from one's role as advocate and try to see the weak parts of the argument to prepare the best available response should the issue be raised.

Some counsel are put off by questions which interfere with the flow of their argument. Most experienced counsel, however, welcome questions, as they indicate the problems the court is having with the argument and give you an opportunity to deal with those problems. Justice Harlan of the United States Supreme Court offered the following advice:

> *"For some reason that I have never been able to understand, many lawyers regard questions by the court as a kind of subversive intrusion. And yet, when one comes to sit on the other side of the bar, he finds very quickly that the answer made to a vital question may be more persuasive in leading the court to the right result than the most eloquent of oral arguments. I think that a lawyer, instead of shunning questions by the court, should welcome them. If a court sits through an oral argument without asking any questions, it is often a pretty fair indication that the argument has been either dull or unconvincing."*

John Hunter Q.C. has written an excellent paper entitled Presenting a Civil Appeal CLEBC Oct. 2010 where he offers advice on preparing for, and answering, questions from the bench.

You must understand what points you need to win your appeal, and what points you can give away. Do not respond to a question from the bench like a negotiation where you may be afraid to reveal your bottom line. Instead, the court's question may simply indicate they are looking for a solution to the problem before them.

Sometimes an effective approach may be to acknowledge to the court if a certain proposition is not accepted then you will lose. Then attempt to convince the court why the proposition should be accepted.

If the court (or a particular judge of the court) is simply not accepting your argument but you believe your argument is sound, press on until you feel you have made your point, but no further.

If the entire bench makes it clear that they are not accepting a point, persistence is probably useless. If you cannot approach the point another way, you may simply have to wrap it up and live to fight another day.

Avoid reading your argument.

It is of course sometimes necessary to read a passage from a case. If you find yourself having to read a lengthy passage, try to break it up by pointing out portions of particular importance or editorializing in a way that will allow you to get your head up and ensure the Court is still listening.

The importance of the oral argument cannot be understated. I can do no better than quote Justice Binnie where he said In Praise of Oral Advocacy:

> "Some lawyers say that oral advocacy, particularly in the Supreme Court, is less important than it was and less important than written advocacy, but I don't believe it. I am going to spend the next few minutes trying to explain why I don't believe it. The big difference between a factum and an oral argument is that the factum gives you a crack at us but, from the judges' point of view, the oral argument gives us a crack at you. It is in the heat and apparent confusion of that exchange that appellate victories are often determined. This is not because good lawyers can get the weak judges to make bad law, but because on occasion a key fact or important legal principle, differently appreciated, can push a close case one way or the other. Any competent advocate can win (or lose) a 9-0 unanimous judgment in the Supreme Court of Canada, but it sometimes takes serious skill to push the court over the line on a 5-4 split."

Suggested Reading

I have relied heavily on several excellent sources for this paper. They are:

- Hunter Q.C., John, Presenting a Civil Appeal, CLEBC Oct. 2010;
- Binnie, Mr. Justice, In Praise of Oral Advocacy reprinted in CLEBC Oct. 2010;
- Cromwell, Mr. Justice, Lessons You Don't Have to Learn the Hard Way reprinted in CLEBC Oct. 2010;
- Laskin, Mr. Justice, Forget the Wind Up and Make the Pitch: Some Suggestions for Writing More Persuasive Factums, reprinted in CLEBC Oct. 2010;
- Laskin, Mr. Justice, View From the Other Side: What I Would Have Done Differently if I Knew Then What I Know Now (1998), Advocates' Soc. J. No.2 16
- Giles Q.C., Jack, The Do's and Don'ts of the Respondent's Factum and What to Do with It When You Are Done, CLEBC, Oct. 2010;
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- Fitch Q.C., Greg, Writing a Persuasive Factum, CLEBC Oct. 2010;
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