

## 2010 RICHARD SEARBY ORATION

delivered by  
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### *'The obligation to communicate: the interaction between language and the law'*

Language has been described as the greatest of all human inventions.<sup>1</sup> It is a defining characteristic of human communication that sets humanity apart.

Consider the communication methods of the vervet monkey. These monkeys employ a system of warning calls to signal the presence of a predator. Three different call types are used to identify a particular predator – be it an eagle, a snake or a leopard. An eagle call will see the animals come to ground, a snake call will see the animals stand to attention

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<sup>1</sup> Glanville Williams *Language and the Law* (in five parts) (1945) 61 LQR 71, 179, 293, 384; (1946) 62 LQR 387.

and survey the surrounding area and a leopard call will see the animals climb up a tree.<sup>2</sup>

The vervet monkeys' means of communication reminds us that many features of human communication are not unique to humans at all. In a similar situation, humans would in all likelihood develop similar calls and codes. In what capacity might we say that language is unique, discernable, or dramatically different from non-human forms of communication?

Humans have an obligation to communicate with one another *through language* in order to operate efficiently as a species. The conventional meanings of words, as in a dictionary, and conventional syntax, as in grammar, provide a code by which humans can communicate thoughts and intentions to each other. We use language as a way of planning for the future and on that point we are unique in the animal kingdom. Other animals, such as ants and bees, cooperate to build complex societies but their cooperation is instinctive. Human cooperation is not, and depends greatly on communication and the use of language.

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<sup>2</sup> Study by Cheney and Seyfarth in 1981, see D Kimbrough Oller and U. Griebel (Eds) *Evolution of Communication Systems* (2004).

Language is the primary vehicle of human communication and a defining feature of humanity. It provides us with a means to comprehend and recognise the world and enables the human mind to comprehend what it sees.<sup>3</sup> Language, therefore, has profound influences on the way humans relate with one another.

A question I pose is whether there has been a divergence between the purpose of language and the purpose of communication? Is language still the primary tool for 'communication' or has there has been a split?

***Communication in the modern era: tech speak, professional language and the 'spin' of public language***

Historically, there has been a clear demarcation between professional and technical language and language used in the community. The language utilised by the law, medicine, engineering and science has essentially worked as an intellectual dialect spoken by the members of the particular profession. It would be most unusual for the language of the

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<sup>3</sup> Goble, 'Nature, Man and Law' in R Henderson (Ed) *Landmarks of Law* (1960) 24, 36.

law in a complex intellectual property, corporations or property trust case to be expressed in language commonly understood by the average citizen. Similarly, technical research papers in the medical, engineering and science disciplines would usually not be expressed in simple, topical language. The disciplines need the use of highly technical language to analyse, deconstruct, build, design and reason the conclusion.

In the last decades, society has seen the development of new professions, which have had a deep impact on the application of language. These professions have been marketing, management and journalism. Initially, it is particularly marketing and management that I wish to focus on. Although, for various reasons I will develop, journalism has become extremely influential.

Language in the community has been dramatically affected by marketing. To sell a product it must be pitched a certain way and promoted with a particular image and, most desirably, a catchphrase. In the setting of globalisation where strategic marketing is essential, society is bombarded with messages and reinforced messages.

In politics, marketing principles are adopted and communication is an art. The effective politician constantly has a finger on the pulse of the media. Political leaders have large media offices constantly monitoring the news, talk back radio, the internet, blogs, twitter and anything where an opinion might be expressed.

This phenomenon of political populism in understanding government is attributed to the consolidation of media monopolies, the impact of technological change and more sophisticated management of media relations.<sup>4</sup> Successive prime ministers from at least the time of Sir Robert Menzies have been quick to grasp media opportunities.<sup>5</sup> Society is connected to both the 24 hour news cycle and the media focus on performance as distinct from content. The modern media form has seen investigative and documentary journalism undermined by 'infotainment'.<sup>6</sup>

At the same time the pressures of the media play out, language is constantly embroiled in effectuating a message, or, countering with another message, or, controlling the negative.

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<sup>4</sup> J Walter and P Strangio *No, Prime Minister*, Sydney NSW 2007, 58.

<sup>5</sup> *Ibid* 59 – 62.

<sup>6</sup> *Ibid* 59.

The impact of the study of management on the language of our community cannot be underestimated. Public language is geared towards productivity. We hear relentless talk of 'outcomes', 'flexibility', 'results', 'profit', 'frameworks', 'core' and 'non-core', 'priorities', 'strategy', 'benchmarks', 'deliverables', 'outputs' and 'inputs'. Books are published advising how to progress from 'success to significance', 'finding the center and staying there' and 'staying the game, but adjusting the plan'.<sup>7</sup> Management development and training focuses on leadership skills. Everyone is to aspire to being a leader. So we have leadership groups occupied by 'leaders' developing other 'leaders'. The established paradigm of a leader being the one out front is old fashioned and substituted by a more corporate approach. In this way we achieve, so it seems, vertical and horizontal work integration.

Simultaneously, management training would have us alerted to the psychological signals of those in our environment. Hence, we have a new phenomenon called 'emotional intelligence'. In the management world we have not so much IQ but now EQ.<sup>8</sup> The odd thing is that there is nothing new in this concept called 'emotional intelligence'. Machiavelli

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<sup>7</sup> B Burford *Half Time*, (1994).

<sup>8</sup> M Newman *Emotional Capitalists – The New Leaders* (2007).

mastered the topic in *The Prince* in the early sixteenth century.<sup>9</sup>

There are two fundamental influences on language and communication today.<sup>10</sup> At one end, there is the 'tech speak': the constant communication via mobile phone and the internet, text messaging, social networking, chat rooms, blogs, face book, twitter. Much of the language produced in these forums is created by younger people and usually takes an abbreviated format. At the other end is 'public language': this is the language of power and influence produced mainly by corporations and government and then reproduced uncritically in the media. Public language has become so widespread that in many ways it has ceased to be noticeable. We accept it as part of our social norm.

So how do we recognise public language?<sup>11</sup>

Firstly, the 'weasel words', the 'buzz words' and the clichés are prioritised so that they take on more importance than the sentence in which they are contained. These words distract us from the meaning of the sentence as a whole. The word

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<sup>9</sup> N Machiavelli *The Prince* (Penguin 1999).

<sup>10</sup> See general discussion by Dr Carolyn Lee, 'Language – from sludge to SMS' in *Voice*, April, 5.

<sup>11</sup> The author was assisted by the work of Don Watson, *Death Sentence: The decay of Public Language* (2003) ('Watson').

'committed' is a favourite in the political sphere: 'we are committed to climate change'. It is helpful politically because it does not mean that the politician believes in climate change or will engage in any activity for that cause. In the legal sector, the phrase 'adding value' has become common place. Lawyers are often asked what is their 'value add' as a means of reviewing performance. Why not simply ask, 'have you performed well'?

An important feature of public language is that nouns are all the rage and verbs are quashed. Verbs that once would have been used in a variety of settings such as 'improve', 'augment', 'increase', 'illuminate', 'widen', 'broaden', have been replaced in many instances by the word 'enhance'. This term is used everywhere to guarantee a hollow sentence. Take a recent promotional advertisement from a telecommunications company for example which says:

*'At our company we are paving the way for better, more enhanced ways of doing business, and these enhanced systems are designed to deliver on that commitment. These improvements will allow for more flexible and efficient billing options as we move forward.'*

Enhance is a popular word for users of public language because it can be readily employed in so many contexts without requiring any meaning.

When we speak, a great deal remains tacit, assumed, implied, background, covert. Spoken language tends to be very ungrammatical and we tend to speak in half sentences or broken sentences. At the same time, our spoken language depends on a lot of extra words. Many features of our language are for spoken use rather than written use.

The inability for people to say what they mean enables modern wordsmiths, spin doctors, to convey the *sound* rather than the *meaning* of the words. Clever use of words make it sound like something has been said, even though the words employed are devoid of meaning. Politicians are skilled at this rhetorical trick. Word spin doctors are masters of 'accommodation'. The accommodation theory says that humans accommodate themselves to other people to better engage them, and help them understand, by noticing whether they are grasping what we are saying.<sup>12</sup>

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<sup>12</sup> A C Grayling *Ideas That Matter* (2009).

The overall effect is that perception may be controlled because the words are devoid of significance. Throughout that process, the language is progressively destroyed.

We use language less and less to communicate. Rather than give consideration to expression, thought, clarity and avoiding ambiguity, it has become easier to use ready made phrases. Sentences are pre-constructed, thoughts are, to a certain extent, pre-determined and true meaning is concealed even from our own selves. It is at this point that the debasement of language becomes clear.<sup>13</sup>

There is a lot of uncertainty as to how we should communicate with one another in today's world and about what kind of relationships born of communication are 'ok'. The way people communicate with each other is central to the quality of social interaction they share. Communication difficulties affect all citizens. Social expectations and belief about class, intelligence and status, are influenced by communication and by the *way* we communicate. Are twitter and facebook real connection? Is digital technology changing the way we relate to each other? Why do some of us have more 'on-line' than 'off-line' friends?

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<sup>13</sup> See G Orwell, *Politics and the English Language* (1946).

Scientific research into our dependence on the internet suggests that the net, with its constant distractions and interruptions, suggests it is turning us into scattered and superficial thinkers. People who read text studded with links comprehend less than those who read words printed on pages. People who watch busy multimedia presentations remember less than those who take in information in a more sedate and focused manner. People who are continually distracted by emails, updates and other messages understand less than those who are able to concentrate.<sup>14</sup>

In an experiment at an American university, half a class of students was allowed to use internet-connected laptops during a lecture, while the other had no computers. Those who browsed the web performed much worse on a subsequent test of how well they retained the lecture's content. Earlier experiments revealed that as the number of links in an online document goes up, reading comprehension falls, and as more types of information are placed on a screen, we remember less of what we see. So that 'the richness of our thoughts, our memories and even our

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<sup>14</sup> N Carr, *The Shallows: How the Internet is Changing the Way We Think, Read and Remember* (2010).

personalities hinges on our ability to focus the mind and sustain concentration.<sup>15</sup>

Concerns about the potential destructiveness of certain forms of communication on our use of language and ability to communicate are not novel. In Ancient Athens, the ability to persuade was key to one's position in society. The rhetorical arts were very important; so important in fact that there were teachers of rhetoric – the sophists. Socrates complained that writing was unreliable and would lead to the corruption of our minds. The true philosophies have to be alive in one's mind, and it can only be the case if you are engaged in doing it, in conversation, interactively. From the Renaissance onwards, rhetoric began a long decline as technological, scientific and material progress dominated human exploits, leaving politicians and advocates to start afresh.

Tech talk and public language are just today's answer.

People no longer talk about language or English or grammar or expression, they talk about communications. It is the effect of the information that matters, not the effect of the words. But language is about far more than communication

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<sup>15</sup> Ibid.

and expressing information. Its about emotions, imagination and independent thought. Most importantly, it is about ideas. As we loose the ability to say what we mean, our language becomes disconnected from ordinary thoughts and feelings. *Critically*, this language cannot be used to persuade.<sup>16</sup>

Written language depends far more on the sense of the words than the rhythm of spoken language which requires extra words for effect and colour.

The use of language is essential if we are to fulfil our obligation to truly communicate. Language has far reaching dimensions, enabling much more than communication alone. It holds great and multifaceted power.

Every true use of language is an attempt to explore a new meaning, a new idea or a new perspective on an old idea or concept. When two people are speaking to each other effectively each speaker is constantly exploring or developing the capacity of language to eke our their own real thoughts and the thoughts and understandings of their conversational partner. They are in the act of producing something that is new, fresh, unique. It is from the real effort to find one's own

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<sup>16</sup> See Watson, above n 11.

words and not the words, clichés or spin words of others that gives effect to our own reading or understanding of the subject of our thoughts.

And it is the interplay of such efforts from two or more humans in dialogue that make possible profoundly new and important discoveries for those involved. This use of language enables creativity, empathy, connectedness and emotional expression.

### ***Language, communication and the Law.***

The greatest source of human ideas, ideals and philosophy is literature. Through language, we gain insight into human nature, experience and condition. The law has often been a theme of some of mankind's most important literature. The fourth Act of Shakespeare's *The Merchant of Venice* in particular sees Shakespeare make elaborate statements about the law, and how it structures the dealings among humanity. Shylock, as an observer of the law feels entitled to all the law allows. He is for the letter of the law. Portia, on the other hand, is for the spirit in which the law should be interpreted.

Language and communication are at the core of a lawyer's work. Many of the day to day obstacles we face are linguistic. A lawyer also spends much time communicating about the law. It is their obligation to do so. Lawyers must communicate about legal issues with colleagues, clients, opponents, business partners, the court and mediators. The role of a lawyer is to *communicate the language of the law*.

Proper use of language and clear communication are essential to the law.

How then do judges decide what words mean? For judges, deciding the hard cases at law is like a literary exercise. A great part of our time is spent trying to decide the meaning of what people have said in various forms which give their words legal effect, such as contracts, wills and statutes. The cases are sometimes concerned with questions of what witnesses should be taken to have meant when examined and cross-examined by barristers in court.

Lawyers use language in a special way. You might ask why this is so given that statutes and contracts are written in ordinary language, like any other written document? Why

should special techniques be required for their interpretation?<sup>17</sup>

There are legal rules which affect the meaning given by the courts to the words other people have used. In day to day communication, the subjective intentions of others have to be interpreted. We have seen that it is sometimes the intention of corporations and governments to use language in a misleading way so that either we do not discover these intentions or because there are simply none. In the law, subjective intention is irrelevant.

The effect of the language of the contract, will or statute in question depends upon what the words objectively mean. This objectivity requires special rules to exclude matters that are about subjective intent.

In the case of a contract dispute for example, judges depersonalise the contracting parties and assume them to be 'reasonable men'. The reason for this is quite simple. If the parties to a contract are in dispute about the extent and meaning of the words of the contract, a person might say that he or she never intended for the terms in dispute to apply

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<sup>17</sup> See the Rt Hon Lord Hoffmann, *The Intolerable Wrestle with Words and Meanings*, 114 S. African LJ 656.

and that the words do not mean what they appear to mean. Such an approach to the language of a contract invites the flaws of public language. It invites 'spin', so that the parties' lawyers find ways to hollow out the purpose of the language of the contract, to find ways to ensure that the words do not mean what they say. When people talk, they lay lines on each other, role-play, sidestep and engage in vagueness. It is expected that others will do this, as we ourselves do it. But a contract holds the other to their bargain *through* language.

When interpreting statutes, the courts look to the intention of Parliament. The golden rule of interpretation is to give effect to the natural and proper meaning of the words not the drafter's intention. Objective interpretation enables judges to render the words of others reasonable.

There are many other ways a judge communicates with the community. Sentencing is one such way. It is one of the hardest things a judge will ever do. It requires a fine balancing act to ensure that the sentence sufficiently punishes the individual for the crime, adequately recognises the pain and suffering imposed on the victim and the victim's family, and sufficiently deters other members of society from the same offending. In sentencing an offender, the judge is

applying the sentencing principles established at law and communicating how those principles affect the lives of those people in the court room. The judge is communicating directly to the community when sentencing.

In some ways, the law is exposed to the same tensions as those of public language. We have our own form of legal dialect, words which serve a purely legal purpose and may have little meaning, or serve no purpose, when we communicate with the public.

The law is full of jargon. In torts cases we are concerned with 'remoteness' and 'foreseeability', 'strict' and 'absolute' liability. In contracts, elements such as 'vitiating factors', 'mitigation', 'repudiation' and 'liquidated damages' and 'penalties'. In equity – we have 'estoppel', 'fiduciary duties', and 'unconscionability'.

In sentencing, courts sometimes use the term 'condign punishment', which really is just a way of talking about whether the punishment for a crime is appropriate. Similarly to the spin of public language, the sound of the words betray their true meaning, a meaning which is probably obscure at any rate.

In criminal law, the evidentiary standard necessary for an accused to be found guilty by a jury is 'beyond reasonable doubt'. In most instances outside the criminal law, a finding on the evidence need only satisfy on the 'balance of probabilities'. This finding is often made by a judge but in some circumstances, by a jury. The judge has an obligation to communicate to the jury, who are the representatives of society and direct them to the meaning of 'beyond reasonable doubt' in the circumstances of the case at hand.

All this legal language proves the point. Judges need to be alert to the fact that technical and legal concepts and language can provide a 'Chinese wall' to society understanding what it is judges have decided and why. There needs to be a mechanism to open up access so that the public can be a real participant and not be excluded because of lack of knowledge and understanding of judges' work and the law.

This year, the Victorian Court of Appeal had to deal with some of the issues that arise from time to time in communication and language in the law.<sup>18</sup> The Court was dealing with an

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<sup>18</sup> See *Martin v R* [2010] VSCA 153.

appeal in which a jury had found a person guilty of a number of crimes.

The day after the jury delivered its verdict, the judge's tipstaff found seven pages of material in the jury room which had been downloaded from the internet in the course of the trial. The seven pages addressed the topic: 'What is meant by beyond reasonable doubt'. The lawyers bringing the appeal sought to challenge the jury's finding because they had referred to these pages.

The Court of Appeal found that these events were immaterial to the outcome of the trial. Nothing would have happened differently had the jury not looked at these documents. What is of interest for our current enquiry is the reason why the Court found this to be so. The *communication* between the judge and the jury at trial was the important aspect. The Court was not concerned with whether it was wrong for the jurors to research the legal issues of the case before them but whether there had been an error in the obligation to *communicate* as it exists between the judge and the jury.

The obligation on judges and lawyers to communicate what the law is in a lucid and effective manner has another feature.

This obligation is so important that in some cases, it is considered more critical than the *words* of the law themselves. In a sense, judges are communicating about the power and force of the law rather than their words.

In spite of all this, can it be said that there is a difference between the language of law and the style of public language? What might that difference be?

The fundamental difference is that the law makes people accountable for the language they have chosen. It makes communication an obligation of the language that structures their dealings. Judges cannot 'spin' in the same way as those in marketing, management, politics and the media. Judges do not have a public voice outside of the judgments they deliver.

Language is essential for real communication if humans are to operate effectively as a species. Hollow language kills thought and invention and presents a real risk to our social interaction as humans. The law, through language and the application of language helps ensure that humans continue to truly communicate through language.

## ***The Future in Communications about Courts' Work***

To recapitulate, judges communicate through language to demonstrate their reasoned conclusion.

Judges do not use power point presentations, signs, billboards, email, blog or Twitter to communicate their decisions. They publish through words why someone wins and someone loses; why someone must experience one form of sentence for a specified time; why a human right is recognised and protected.

In their judgment writing, judges might use headings, footnotes, state the bare bones of the case and their conclusion at the beginning or recapitulate their decision at the end. Sometimes they will include charts and photographs. For judges communication is about a reasoned result. For them, communication is not about persuasion, winning the debate, capturing the market, achieving the maximum return or using catchy slogans.

So, into the modern communications scene the judges' decisions land without commentary from the judge. The judgments land in the 24 hour news cycle, generally without

any audio or visual content. They are vulnerable to the news-hungry commentariat who will usually focus on the outcome, not the reasoned process to reach the outcome, then deplore the result if it is unpopular and proceed to criticise the judge.

The commentators' role to provide to the public a real entry into understanding what has happened is very important. Yet, their contribution often displays a disinterest in the judicial path of reasoning or insufficient commitment to devote the time to discover and communicate that reasoning.

Now this is deplorable for society. Judges, especially in the higher courts spend most of their time writing their judgments: the reasons for their decisions. Whilst the judgments are studied closely by the litigants' lawyers, appellate courts, academics, law students and government agencies, no one else much reads them. The judgments are without a doubt important. As part of our democracy, every citizen is entitled to have the chance to review a decision against them. For society, the judgments signify that we operate a democracy applying the rule of law.

Judicial stoicism and reticence means that judges are vulnerable. Recently, the Victorian Court of Appeal delivered

an important judgment that discussed community expectations in sentencing. The court discussed the role of the media and the need for cooperation between the media and the courts to help the community develop better awareness of what happens in the courts. The judgment was released with a summary that was made available to the media and put on the Supreme Court website. Two days after the judgment was delivered, one of Melbourne's popular radio programs ran a discussion on the judgment and the decision. The commentators described the result but little of the reasoned process. An invited commentator, a lawyer, spoke about principles of sentencing. Ultimately, it was a lively discussion that may have helped society better understand the sentencing process. At one stage, one of the commentators [who did not seem to have read the judgment or the summary] said that the judges needed to be knocked off their perch. So, how does a judge respond to that? Traditionally, we have been stoic, reticent, reserved and mostly philosophical. That said, we see in the media, particularly the popular press, that judges are viewed as fair game and severely criticised more and more. We even see selective attacks on judges based on their gender. As a rule, modern attorneys-general are restrained in stepping up to defend judges on these occasions. I expect that as

politicians they prefer to see courts do it for themselves. Mostly, judges are not trained communicators. They focus on their work in court and their reasoned judgments. Sometimes heads of courts speak publicly, but usually on a general not a case specific basis.

Some in society might wonder why judges stop communicating once their judgments are delivered. Some might ask, well why do individual judges not appear on radio, television and the internet or blog and twitter directly with society about why they decided their case as they did? The reasons judges do not are because: first, they must remain objective and uninfluenced by matters outside the courtroom; secondly, they must be seen to be independent; and, thirdly, the reasons for their decisions are tested, and if wrong, corrected in the appellate courts not the court of public opinion.

But what other interest do judgments hold? This is the conundrum I think for the judiciary. How do we communicate our judgments so that society values and debates them on an informed basis?

Judges are encouraged to provide judgments in a comprehensive, organised and accessible form. Most judges receive training, not just from other judges but skilled academics and writers so as to communicate more effectively. A number of judgment writing workshops are held for judges across Australia each year.

Picking up on what I said a little earlier, the difficulty for judges, and it is a very real problem of communication is that judges do not communicate on a two way basis the way the rest of society does. Rather, judges deliver, as I have said, reasoned judgments that explain the outcome. The judgment form does not pursue engagement. It is an outcome, a reasoned decision.

This is where I suggest the problem occurs for the judiciary. When the fact of an unpopular or controversial decision is known judges are vulnerable to the fact that they do not communicate beyond their written judgments' language. They do not engage or explain to society why the decision has been reached beyond their judgments. For the society this causes frustration. At the same time, society is dependent upon the media for knowledge of the fact of judges' work. This dependence means judges are at risk that

the community only learns about the outcome and not how it was reached. We know from analysis out of Yale University that the modern media knows that information about judges' work in the criminal sector is cheap, readily available, topical news. It is capable of fast, attention grabbing headlines, quick internet entry and, above all else, is an area where public opinion is quickly provoked. It is easy to engage surrounding players, more often than not, those who are unhappy with the outcome. Against these strongly communicated views the judge remains silent.

There are some easy and obvious things to do: first, publishing judgments with summaries on the internet; secondly, streaming suitable judgments on the internet, at the very least providing audio recordings; thirdly, preparing accessible commentaries of more important judgments for publication in newspapers, including on line; fourthly, providing a qualified court commentator who is on top of the case and decision and able to speak in the media and on multi-media like Youtube about the reasoned conclusion - a court employed retired judge could do this well; fifthly, publishing a weekly court newspaper on line with links to courts' web pages and reasons for decision.

It is not enough in the 21<sup>st</sup> century for judges to only communicate through the words on the page that are later published on-line and in law reports. Without succumbing to managerialism and marketing styles, the courts must look for other ways to have the judicial voice heard and understood. It is part of the obligation to communicate and society's right to know, not just *what* the judge decided, but *why*.

Ultimately, we need to ask the question, who is the audience? Is it the next appellate court up the court hierarchy? The parties in the case? Or the public? I suggest it is all three for different reasons. For society to have full confidence in the judiciary that underpins our democracy the judgment process needs to be accessible through effective language including technology. Then, I would hope, the obligation to communicate and an effective interaction between language and the law would be fulfilled to the ultimate benefit of society.