

**THE HIGH COURT OF AUSTRALIA ANNUAL LECTURE  
BY NICHOLAS HASLUCK AM, QC: 5 OCTOBER 2016**

**THE AWKWARD QUESTION: WILL IT WRITE?**

*Abstract: A judge's obligation to provide reasons for judgment can be attended by an awkward question: will it write? Will a preliminary conclusion succumb to second thoughts in the act of writing? That cautionary feeling, the need for self-examination, reflects the close relationship between preparing reasons and the judge's final decision. The act of writing may take the jurist to another level, a solitary realm with room enough for ingenuity and nuance: rethinking affected by style and experience. This lecture asks: to what extent are judgments affected by style and intuition? Are difficult cases resolved by the rational mind alone? What lessons can be learnt from literature?*

\*\* \*\* \*

Chief Justice, Your Honours, the Attorney General, Distinguished Guests, Ladies and Gentlemen. Let me begin by saying that the invitation to give this lecture is much-appreciated. Especially so because it comes from Your Honour, the Chief Justice – a widely-admired leader of the profession in my home state, and much further afield.

I am conscious, of course, that not all invitations are so deeply appreciated. Many years ago the famous playwright George Bernard Shaw delivered an invitation to his old adversary, Winston Churchill, in these terms. 'Come to the opening night of my new play, and bring a friend – if you have one. To which Churchill replied: 'I will come to the *second* night – if there is one.'

This brief excursion into comparatively recent history lures me back to other corners of the past, and to my theme: the power and importance of clear language, and clear thinking.

Shakespeare's two great history plays, Henry IV parts One and Two, are concerned with the pursuit and exercise of power. But they are remembered also for the way in which Prince Hal shakes off the fat and disreputable friend of his youth, Sir John Falstaff, and adopts the remote demeanour of a king. Along the way we are presented with two denizens of the legal system – the Lord Chief Justice of the King's Bench and an egregious country justice, Master Shallow. These two lawyers not only come from different levels of the judicial hierarchy but are so unlike each other that they could be seen as a personification of the difference between order and disorder.

The Chief Justice speaks to the courtiers around him in this manner: 'Sweet princes, what I did, I did in honour, led by the impartial conduct of my soul'. When Prince Hal, now Henry the Fifth, arrives to review the prospects of his new regime he commends the Chief Justice for 'his bold, just, and impartial spirit.' The Chief Justice is, in effect, being complimented for his courage and judicial independence.

On the other hand, in an earlier scene, where Falstaff is forced to converse with Master Shallow in the course of conducting a dubious recruiting drive, even Falstaff is repelled by the avidity with which Shallow seeks to relive their sleazy adventures of yesteryear. 'We have heard the chimes at midnight, Master Shallow,' Falstaff agrees eventually, but without enthusiasm, conscious that Shallow's boastful ramblings as a self-anointed man of the world will lead only to a reminder of their age and approaching mortality. Upon Shallow's

departure, Falstaff mutters to himself: ‘How subject we old men are to this vice of lying! This same starved justice hath done nothing but prate to me of the wildness of his youth. And the feats he hath done about Turnbull Street, and every third word a lie.’

The two judicial officers are fictional characters, and not to be taken too seriously. Even so, within a brew of fact and fiction, and validated to a certain extent by the wisdom of the bard, they are worthy of further consideration. They remind us in a roundabout way that judicial strengths are always at risk of being undermined by human flaws. They remind us also, as indicated by Prince Hal’s transition from wayward youth to commanding monarch, that a broad experience of life can be turned to account. Falstaff’s shrewd appraisal of Master Shallow suggests that power plays in the king’s court and shenanigans in the world below are but mirror images of each other, and the threat of disorder will always be with us.

These reflections lead me, albeit indirectly, to what is perhaps the central feature of a judge’s life: the hearing and deciding of cases. With that in mind, let me turn a blind eye to Master Shallow’s musings for the time being, and look instead at the credo mentioned in the Chief Justice’s scene: impartiality and judicial independence. These requirements, and the notion that cases are to be decided not by reference to the judge’s personal views, but strictly in accordance with existing law, are central to the handing down of judicial rulings. They bring with them an obligation to provide reasons for judgment as a normal incident of the judicial process.

Because the courts must conduct their proceedings in public, and justice must be seen to be done, the parties and those with an interest in

the matter are as much entitled to know the reasons for a decision as they are to see the witnesses. Moreover, if the case be taken further, the appeal court will be impeded in its function if no reasons have been given. It is of critical importance for a judge of first instance to look to the evidence and make findings of fact.

If the appropriate ruling is obvious the judge's reasons may well be provided immediately in an oral form. In other cases, and especially as to cases taken on appeal, the matter may be difficult to decide because it is new, or the relevant legal principles are unclear, or the materials before the court are substantial.

In an extra-curial essay written in retirement, a former judge of the High Court of Australia, Sir Frank Kitto observed that the only worthy question where circumstances do not positively require an immediate judgment, must surely be: will an oral judgment serve the proper purpose of a judgment as well as a written one would do? By reserving judgment the judge knows from experience that the very exercise of thinking and rethinking gives greater opportunity for detecting hidden fallacies, and reduces the chance that some relevant point has been missed or glossed over in the argument. A quiet rereading of the evidence by oneself almost always yields some reward, even if only in the matter of perspective. What we think we think often undergoes a remarkable change when we go through the discipline of writing it down.

His Honour's paper was written over forty years ago. Since then there have been many changes in the complexity of cases presented to the courts and in the style of contemporary thought, from a heightened awareness of human rights and discriminatory practices to the critiques of postmodernism. To what extent do changes of this kind affect the process

of 'rethinking' (the term used by Kitto) and the preparation of written reasons?

A judgment must strive for the correct result but it must also be convincing: to the parties involved and ultimately to the entire community. The way in which rulings are expressed, the judge's style, is a critical feature of the judicial process. Inevitably, the more one strives to perfect a sentence or find the exact phrase, the more likely it is that the act of writing will take the jurist to another level, a solitary realm with room enough for ingenuity and nuance in resolving doubts or difficulties: a place where palpable alternatives can be examined and tentative views rejected, if they simply won't fit.

In contemporary times a judge must not only be clear and persuasive but alert to the possibility of misunderstanding or causing offence. There could well be consequences if a word is used too loosely or a sentence is cast adrift by a clumsy adjective or some facetious or provocative aside.

The hearing of pleas by counsel in open court, or the reading of carefully crafted written submissions, can leave the judge with a range of responses, from intuitive resistance to the argument being advanced to a realisation that some piece of evidence or previously under-emphasised rule of law provides a key to the puzzle. Indeed, even with the benefit of hindsight, a judge may find it hard to identify the exact moment when he or she reached a final decision. For many judges the critical moment seems to be closely related to finalisation of the reasons for judgment. This suggests that in difficult cases the moment of decision and the act of writing are as one – they come together, they merge, as if by instinct.

I will say more about these matters shortly. For the time being, in speaking of style and the moment of decision, I trust that I have said enough to suggest that a judicial officer's cautionary feeling at the end of the hearing includes the posing of an awkward but crucial question: *will it write?* Will a preliminary conclusion succumb to second thoughts in the act of writing? To what extent will it have to be refined or even abandoned as one draft follows another? Like any writer, the judge knows from experience that the act of writing will bring into play a process of rigorous critique. What is the best style? What is to be done about certain unexamined assumptions that have been troubling the judge?

In *Theophanous v Herald & Weekly Times (1994) 182 CLR 104 at 196*, while discussing the implied constitutional freedom of communication about government and political matters, Justice McHugh of the High Court noted that underlying what is written will be ideas and values which the judge has been affected by in legal practice and in private life, including many ideas and values which are taken for granted by the legal system itself. He said: 'The true meaning of a legal text almost always depends on a background of concepts, principles, practices, facts, rights and duties which the authors of the text took for granted or understood, without conscious advertence, by reason of their common language and culture'.

*Will it write?* That is the question. Will the judge's preliminary view of the matter, various thoughts or notes roughed out in the course of the hearing, not only be correct but sufficiently convincing to serve the proper purpose of a judgment? Or do they throw up doubts and possibilities that have to be dealt with? Will unexamined assumptions stand up to further scrutiny in the act of writing?

In looking for enlightenment perhaps we should turn again to Shakespeare, that insightful master craftsman, a wordsmith with an uncanny capacity to acquaint us with the workings of a restless mind. In one of the history plays he employs the hyphenated, adjectival word 'still-breeding'. The bard speaks of 'still-breeding thoughts': an ingenious use of the word 'still' which, in this hyphenated usage, coupled with the notion of 'breeding' conjures up an image of both delay and movement, melding the possibility of stillbirth with the more pleasing prospect of further growth and ultimate achievement.

*Still-breeding thoughts!* What better way to evoke the feeling of caution involved in reserving judgment and posing to oneself the crucial question: will it write? For write it must, one way or the other, and be well-written in order to fulfil the proper function of a judgment in contemporary times. It must speak to the parties in a practical way, and to the wider community. It must be convincing. It has to work. 'We must not make a scarecrow of the law,' Shakespeare said in *Measure for Measure*. 'Setting it up to fear the birds of prey, and let it keep one shape, till custom make it their perch and not their terror.' I take him to mean that, above all, the law must be intelligible, it has to remain relevant, and it has to be respected, otherwise it will be treated with indifference. The same applies to written judgments. They should aim to bring the dispute to a just conclusion. The reasons should be clear, persuasive and presented to the world as a vital, up-to-date force. Hence, the importance of the question: *will it write?*

This brings me back to the act of writing, to the importance of writing style and to the style of thought in contemporary times. Judicial independence is a central feature of the rule of law in a modern

representative democracy: the notion that judges will decide cases impartially, by the application of existing law to established facts, and without regard to personal whims or the vagaries of public opinion. Nonetheless, as the famous author and former barrister, John Buchan, noted in a thoughtful essay called *Judicial Temperament*, ‘mere cleverness is an ineffective thing in most walks of life, and will certainly not, by itself, make a great judge. For that is not the only desideratum, certain conspicuous gifts of character are demanded.’ This points to what lay observers may see as an obvious point – character tends to be reflected in a writer’s style and this tendency will be true of judges, although the rules of evidence and the credo of objectivity will have an effect upon what they say and how they say it.

The influential 19<sup>th</sup> century American writer Emerson was not a judge but he wrote on matters of public interest in a time of striking social change. It was said of him by one of his biographers, Robert Richardson, that the sentence, not the paragraph, was the main formal and structural unit of his remarkable style. Also, ‘Emerson’s lifelong interest in sentences pushed him towards epigram and proverb, and steered him away from narrative, from logic, from continuity, from formal arrangement and effect. Pushed as far as he pushed them, many of Emerson’s sentences stand out by themselves, alone and exposed like scarecrows in a cornfield.’

Were these scarecrows with palpably scary gestures that conveyed a real feeling of apprehension to the surrounding birdlife, or was each of them simply a Shakespearean scarecrow, casting a forlorn shadow on the surrounding earth, a figure bereft of any threat to the skylarking birds perched upon its sagging shoulders?



The judicial process favours linear stories, a neat chronology, words chosen not with a view to heightening drama but as a means of avoiding ambiguity. The first draft of a judgment is generally pushed towards continuity by evidentiary rules that insist upon relevance, and by legal principles that shape the logic of the situation. For this reason, as Kitto intimates, the judicial mind, in its search for clarity and avoidance of error, will favour a crisp, grammatical style, seldom enriched by epigrams or metaphors or other literary flourishes that could be open to various interpretations. Nonetheless, if the aim is to be convincing, to leave more than an empty gesture in the cornfield, there may be certain cases in which it might well be fruitful to draw upon the resources of literature. But one has to be careful.

In response to a householder's application for an injunction to restrain the playing of cricket on a field by a newly-created housing estate Lord Denning commenced his well-known (or notorious) judgment as follows: 'In summertime village cricket is the delight of everyone.' Not surprisingly, after such a start, he refused the injunction, but his storytelling tone, with its echo of a timeless fable, a pre-destined end, has left us with the question of whether the reasons for judgment were truly convincing. The literary style added a certain force to his conclusion, and rendered the judgment memorable, but did it really work? Did it fulfil the purpose of a judgment? Did the tone and selection of details - 'the young men play and the old men watch; the wicket area is well-rolled and mown' - clarify or confuse the issue to be determined by the court?

In another glorious (or possibly vainglorious) moment in the annals of judicial folklore Lord Denning paved the way to a new remedy in damages for nervous shock with a judgment that began: 'It was blue-bell

time in Kent.’ Was this the best way to introduce the disastrous scenario that followed; that is, while picking blue-bells in the field opposite the lay-by where her husband was at the back of his Bedford Dormobile making tea, Mrs Hinz turned to see a Jaguar car rushing into the lay-by with fatal consequences? Did the wistful preface to the melodrama waiting in the wings – humble Dormobile versus flashy Jaguar – affect the flow of legal reasoning?

In his autobiography *The Family Way* Lord Denning said that ‘the proper role of a judge is to do justice between the parties before him. If there is any rule of law which impairs the doing of justice, then it is the province of the judge to do all he legitimately can to avoid that rule.’ A robust view of this kind will probably find favour with certain sections of the public, but if the style is the man, to use a well-worn phrase, there are various indications in Denning’s style, from blue-bells to neatly-rolled cricket pitches, that such a credo may lead to arbitrariness, and range beyond the conventional view that judges should strive to apply settled law to carefully established facts.

What are we to make of the man on the Clapham omnibus, a familiar figure in legal reasoning? An ordinary man, a sturdy fellow with bags of common sense, a spectral figure heading south through Clapham to the housing estates of Croydon, haunting one judgment after another along the way. Should he be regarded as a help or hindrance? Is the outlook attributed to him a matter of the kind mentioned by Justice McHugh in *Theophanous*; that is, an underlying factor which is taken for granted by those involved in a court case – an unexamined assumption, possibly denoting an overly complacent approach to the law?

There is a continuing debate in legal circles as to the extent to which judges and judicial methods can or should accommodate policy considerations or contested values. Postmodern thinkers are inclined to question basic assumptions, coherent narratives, supposedly established values and the possibility of objective truth. Moving well beyond Lord Denning's contentious credo these contrarians oppose elitism and whatever they consider to be authoritarian. They favour relativism and pluralism.

Much of this critique has come to the fore since Sir Frank Kitto explored the practice of reserving judgments and the need for rethinking. It has taken place mostly in academic circles, but the theorists involved in the various exchanges have certainly been active in conveying their views to the wider world. Indeed, as to various current orthodoxies concerning human rights and discrimination, elements of postmodern theory have found their way into reformative legislation and decisions of the courts.

Some years ago, in a paper presented to the Australian Bar Association, Justice Susan Crennan, observed that values established in the era of the enlightenment were under attack by postmodern European theorists. They saw law's emphasis upon truth and rationality as simply some kind of power play designed to shore up property rights and other facets of bourgeois life. But this sceptical approach, she argued, failed to give sufficient weight to judicial independence and those traditions of the common law which encourage decision-makers to examine disputes from all sides. Moreover, judges are obliged to carry out their work in courts open to the public, to hear all parties impartially and to give reasons for judgment which can be criticised. There are rights of appeal. The common law process demonstrates that reasoned argument can arrive at

truth in the sense of a correct result. A well-written judgment can persuade the interested parties of that correctness.

According to Emerson ‘the way to write is to throw your body at the mark when your arrows are spent.’ His advice to a young admirer included a barb that could well have been aimed at the nihilistic European theorists: ‘Reading long at one time anything, no matter how it fascinates, destroys thought as completely as the inflections forced by external causes ... Learn to divine books, to feel those that you want without wasting much time over them .... The glance reveals what the gaze obscures.’

A glance may indeed be enough to dispose of certain arguments in court or even a battery of lengthy written submissions. In the higher courts lawyers for the parties spend a good deal of time on submissions partly devoted to camouflaging the points that weigh against their case. But their handiwork doesn’t always survive a quick inspection. An array of weighty submissions may simply remind the judge of some humorous moments in the lower courts. A young lawyer lurching into Petty Sessions with an armload of books is invariably greeted with the jocular riposte: ‘I take it the facts are against you.’ Yes, a glance may reveal what a gaze fixed upon carefully contrived submissions may fail to notice.

Nonetheless, if a judgment be reserved, there is usually enough in most submissions to compel another reading. But this still leaves the question of how the reasons for judgment should be expressed? On an Emersonian view of the task, if not the body, certainly the best part of the judge’s mind should be thrown at the judgment to get it right. The judge will, of course, remain conscious of the need to be objective, but the likelihood is that a little of the judge’s own experience, be it blue-bell

time or the cricket season, will probably be brought to bear upon the matter in hand.

What allowance should be made for factors of this kind in posing the question: will it write? The reality is that although the initial enthusiasm for postmodernism may have subsided it has left a question mark over the notion of truth and objectivity. In some circles magisterial utterances of any kind will be greeted with suspicion. So care must be taken in voicing what a judge in former times might simply have characterised as common sense or lessons drawn from personal experience. But the point made by John Buchan remains. Cleverness isn't enough. The public expects judges to be people of character, and this will probably be reflected in how they respond to the cases before them and in what they write.

Let me test this line of thought by returning to a matter I touched on in earlier discussion: the implied freedom of communication about government or political matters – a comparatively recent addition to the matrix of constitutional debate in this country. The 'still-breeding' thoughts involved in this discovery can be traced back to the High Court's decision in the *Nationwide News* case in 1992.

It emerges from this seminal decision that, in the absence of any express provision in the Australian Constitution concerning free speech, the implied freedom was based principally upon provisions requiring that members of the Commonwealth Parliament be directly chosen by the people in a manner compatible with what is known as the Westminster system of government.

It was held by a majority of the High Court that if the people are to make an informed choice of their parliamentary representatives, the Constitution implicitly requires that they are free to discuss whatever issue might be relevant to that decision. The rule operates as a restriction on Commonwealth, State and Territory power. It then emerged from discussion in *Theophanous* that the implied freedom also expands the common law defence of privilege in defamation with respect to public figures.

Not surprisingly, the scope of ‘communication about government or political matters’ was examined in later cases. These decisions suggest that without compromising their commitment to objectivity judges bring to the preparation of reasons something of their own outlook and experience.

For example, in *Coleman v Power (2004) 209 ALR 182*, the High Court was urged to set aside the conviction of the appellant Coleman for an offence under Queensland’s *Vagrants, Gaming and Other Offences Act 1931* for publicly insulting Constable Power in the Toowoomba Mall by calling him a ‘corrupt cop’. The Queensland Attorney General conceded that the statutory offence imposed a burden on the implied freedom due to a link between local police corruption and federal affairs. This led to the case turning upon the nature of the language used and whether the statutory provision was compatible with the purpose underlying the implied freedom.

A minority of the Court, consisting of Chief Justice Gleeson and Justices Heydon and Callinan, were of the view that the provision was compatible with the maintenance of constitutional government, but they expressed different views as to whether the language in question could be

said to facilitate reasoned debate. Justice Heydon was of the view that ‘insulting words do very little to further the benefits that political debate brings. Indeed, by stimulating anger or embarrassment or fear they create obstacles to the exchange of useful communication.’

In the end, the conviction was set aside because, in the view of three members of the majority, the words could not be characterised as insulting, and in the view of Justice McHugh because the provision did infringe the implied freedom.

One member of the majority, Justice Kirby said this: ‘Reading the description of civilised interchange about governmental and political matters in the reasons of Heydon J, I had difficulty in recognising the Australian political system, as I know it. His Honour’s chronicle appears more like a description of an intellectual salon where civility always (or usually) prevails. It is not, with respect, an accurate description of the Australian governmental and political system in action. One might wish for rationality, less superficiality, diminished invective and increased logic and persuasion in political discourse. But those of that view must find another homeland. From its earliest history, Australian politics has regularly included insult and emotion, calumny and invective in its armoury of persuasion.’

It emerges, then, that what may seem insulting to one mind may seem less than that to another. There may be different views as to the nature of political discourse. There will be room for conscientious disagreement as to what acts or utterances or gestures are compatible with communication about political matters, or as to what is a typical form of debate. The judgements in *Coleman v Power* show how lines of reasoning

and the final orders were probably affected by outlook and personal experience.

What will happen next in this recently-discovered field of constitutional law? There have been significant technological developments since the first few cases concerning the implied freedom were decided. The civilities of the salon scorned by Justice Kirby have been subjected to even greater indignities by various gadgets. These days panel discussions on TV are often accompanied by scatterings of twitter feed on the bottom of the screen. Most of these are probably well-meant, but some at least look as though they come from the mysterious granary that Premier Joh Bjelke-Petersen used to dip into on his way to a press conference: handfuls of stuff known to him, and eventually to the journalists clamouring for his attention, as ‘something to feed the chooks.’

The same sort of thing is happening in the private domain as people rattle out their responses to an issue in mangled, quasi-techno shorthand, spiked with exclamation marks and other brutal assaults upon the English language. Gadgets have brought with them a compulsion to know more and more about less and less. The echo chamber known as the news cycle pulsates with confected outrage and political clichés. Half-baked ideas are flung into cyberspace before the facts of a matter are fully known.

In talking about the writing of judgments, or the scope of the implied freedom of communication, most observers of the legal scene still point to the qualities of independence and impartiality personified by Shakespeare’s Chief Justice. These qualities are thought to reflect the essential nature of judicial work in the common law system. Unfortunately, in a postmodern era in which the notion of objectivity is



under attack, and logic is blurred by slovenly habits of speech and a lack of familiarity with values that once were taken for granted, the old ways are at risk. Gadgetry – apps and ‘mishapps’ – may soon be accompanied by a widespread impatience with detailed analysis and protracted reasoning, an impatience reflected initially in the jargon of media-savvy law reformers and eventually in amendments to the rules of court.

Will judges in some new, paperless Land of Oz be expected to worship Facebook or follow hash tags on the way to a ruling, before high-fiving colleagues on the bench and keying in what is now the most dangerous word in the English language – SEND? Will rights and freedoms be fully effective, especially implied rights unsupported by the text of the Constitution, if they are reduced to vacuous rhetoric by the idiosyncrasies of cyberspace, or the daydreams of the man on the Clapham keyboard?

I have allowed myself this moment of dystopian fantasy for the sake of an enjoyable discussion, but various facets of the emerging social scene suggest that it is not entirely far-fetched. To some extent at least it bears upon the theme I voiced in opening – the need for clear language. Bad habits can be spread by imitation at every level. Clumsy language can lead to unclear thinking, soon to insults, and eventually, as Justice Heydon observed, create obstacles to effective communication. And all of this at a time in western democracies when there is an increasing suspicion in the political arena of what is said and done by professional elites; there are doubts about the notion of objectivity; there is a belief as to racial issues that only a victim can be heard because only a victim has real knowledge of the matters complained of; the notion of sovereignty is being questioned, and there are those who say that the legal system with

its load of tradition is crushing the human values the law is meant to represent.

There have been various responses to critiques of this kind ranging from an increased emphasis upon human rights to statutory reforms, particularly with respect to the workings of administrative tribunals. Thus, to take but one example, a statute with an apparently sympathetic face is now inclined to say that ‘the Tribunal is not bound by the rules of evidence and is to act according to equity, good conscience and the substantive merits of the case without regard to technicalities and legal forms. The Tribunal may inform itself on any matter as it sees fit’.

Face or mask? Justice or palm-tree justice? The problem is that in an increasingly diverse society such as Australia, beset by critiques of the kind mentioned earlier, it becomes difficult to identify the background of common cultural values described by Justice McHugh which are taken for granted and generally thought to underpin matters of equity and conscience, and to give a real meaning to most human rights. Paradoxically, provisions concerning human rights tend to reflect various abstractions, with one often qualifying another, which may seem daunting or confusing to the people they were supposed to assist.

In the end, clarity can only be provided by the courts, but this will be difficult to achieve if the criteria they are to apply become increasingly uncertain. These days unexamined assumptions can include not only traditions reviled by postmodern theorists but also palm-tree justice provisions and any virus slipped into the system by the theorists themselves: current orthodoxies, usually of a puritanical kind, that begin as critiques of the established order but then insist upon being characterised as self-evident truths.

In times to come, perhaps, Australian courts and legislators will reconsider what Justice McHugh called the ‘background’ to the legal system and accept that not every problem can be solved by the law, nor every claim be reinvented as a right. The Australian Constitution, unlike the Constitution of the United States, does not spell out those basic rights which are taken for granted in a free and democratic society. They exist, not because they are provided for, but in the absence of restraints upon them. Freedom of speech exists in this country essentially because there is nothing to prevent its exercise, save in accepted areas such as defamation or sedition, or more recently where someone complains of being offended under s18C of the Racial Discrimination Act 1975 (Cth).

In the meantime there will be a continuing need for well-written judgments in the traditional form, clear and coherent, but with weight being given to changing social habits. A judge has to balance old and new; discern when to adjust and when to stand firm. Without succumbing to political correctness or the taste of twitter-feed, the judge should aim to strike a contemporary note so that what is said doesn’t stand in a barren field like Shakespeare’s scarecrow, stuffed with archaic precepts, viewed with indifference. Persuasive rulings have a crucial part to play in demonstrating that judicial power is not to be exercised capriciously. Well-written judgments at the very least may help to slow the spread of computer waffle and the sending forth of vacuous texts.

The need for a clear ruling is bound to bring with it a tone of certitude, as a means of allaying any doubts about the correctness of the verdict. But this, of course, is partly window-dressing. For behind that tone stands a process of weighing up the pros and cons and looking at the matter from all sides, as shown by the drafts left in the secretarial bin.

The scene behind the judicial façade may look untidy, but it is actually reassuring. The pages abandoned in the bin underscore the integrity of the reasoning that survived. The final text is like a double-sided tapestry, of the kind mentioned by the poet Howard Nemerov:

*On this side of the tapestry  
There sits the bearded king,  
And round about him stand  
His Lords and Ladies in a ring.  
His hunting dogs are there,  
And armed men at his command.*

*On the far side of the tapestry  
The formal court is gone,  
The kingdom is unknown:  
Nothing but thread to see,  
Knotted and rooted thread  
Spelling a world unsaid.*

*Men do not find their way  
through a seamless maze,  
And they can all direction lose  
In a labyrinth of clues,  
A forest of loose ends  
Where sewing never mends.*

The double-sided nature of the reasoning process, the way in which a forest of loose ends becomes a formal court, disorder is woven into order, will serve to remind us that well-written judgments are a crucial stage in the exercise of power and the quest for a just result.

The tapestry and the bearded king will take us back to where I began. To Prince Hal, destined to become King Henry V, and to those around him, from the impartial Chief Justice to the friends of Hal's youth – the ageing Falstaff and that scabrous country justice, Master Shallow.

Shallow, it seems, harkened not to the sober advice of those learned in the law, the voice of reason, but foolishly to the chimes of midnight: a distant bell that once signalled the lateness of the hour and the liberty of youth, then all too soon, as foreshadowed by Falstaff's intimations of mortality, a bell that tolls for all of us to mark the end of things. On that pensive note I will end my address this evening.

\*\* \*\*

*The Hon Nicholas Hasluck AM, QC studied law at the University of Western Australia, then Oxford, before practising law in Perth. He served as a part-time President of the Equal Opportunity Tribunal (WA) and later as a Judge of the Supreme Court. He was Chair of the Literature Board and is presently Chair of the Art Gallery of Western Australia. His books include Legal Limits on law and literature, and various novels such as Dismissal and The Bellarmine Jug, winner of The Age Book of the Year Award. He was awarded an Honorary Degree of Doctor of Letters by UWA before leaving the Bench in 2010. His new novel The Bradshaw Case concerns a Native Title claim in the Kimberley and the origin of ancient rock art.*