

Scurrilous Abuse

Red flags: sarcastic, inflammatory comments

- [X] will argue that [A]’s comments constituted scurrilous abuse because it attacked the *judge in their capacity as a judge* through **invective** that was beyond temperate criticism.
- [X] would argue it was not done in “good faith” but acting in “malice” (Lord Atkin *Ambard*).
- **Identity** who says scurrilous abuse is a relevant factor that courts take into account (*Lovitt*):
 - o Aggrieved party venting ≠ understandable
 - o Person in a position of power/status → words carry more weight in undermining court

✓ <i>Gray [1900]</i>	✗ <i>Bell v Stewart</i>
<ul style="list-style-type: none"> • “Little Tich [short comic figure]” • “His diminutive Lordship positively glowed with judicial self-consciousness” • “impudent little man in horsehair, a microcosm of conceit and empty-headedness” 	<ul style="list-style-type: none"> • “The detachment of the Arbitration Court from the facts of industrial life” • “the public from feeling amused at this display of innocence from the Bench”
<ul style="list-style-type: none"> • Mocking, humiliating, insulting, implied he lacked merit as a judge • Brought the court into disrepute • NB: 1900 case → criticisms of public institutions may have changed overtime 	<ul style="list-style-type: none"> • NOT scandalising – not attributing bias, injustice on Higgins J • Article says: Higgins J refused to assume facts based on his personal knowledge and insisted on proof • It is reasonable to expect judges to insist on evidence before making decisions, and not rely on their own judicial opinion
✓ <i>Dunbabin</i>	✓ <i>Lovitt</i>
<ul style="list-style-type: none"> • “High Court knocked holes in Federal Laws” • “the ingenuity of five bewigged heads” • “If the High Court were given some real work to do the Bench would not have time to argue for days on the exact length of the split in the hair, and the precise difference between Tweedledum and Tweedledee” 	<ul style="list-style-type: none"> • QC barrister turned to members of <u>media</u> and said in an <i>audible voice</i> about the Magistrate: • “This bloke’s a complete cretin.”
<ul style="list-style-type: none"> • Mocks authority of HCA; that HCA exercises excessive legal ingenuity in overturning Pmt’s federal laws • Would shake the confidence of litigants and public to trust the courts’ decisions • Would weaken the spirit of obedience to the law • Leading readers to despise the HCA 	<ul style="list-style-type: none"> • Intended journalists to hear his remarks and publish them to the public to undermine the Cts publicly • Fact that he was a QC → experienced and professional: the public expect his criticisms to be considered and knowledgeable; he knew he was a professional advocate • Implied that the Magistrate was incompetent and unable to discharge his duties properly = impairs authority of court and undermines public confidence

Allegations of partiality or impropriety

Red flags: assertions of bias, impugning integrity, suggesting impartiality

- [X] will argue that [A]’s allegations of partiality/impropriety constituted scandalising contempt because it *imputed bias/impartiality* on the judge that had a tendency to undermine public confidence in courts.

<i>Munday</i>	✓ <i>Gallagher</i>
<ul style="list-style-type: none"> • Munday’s impromptu interview: 1) ✗ Trial and sentences were a miscarriage of justice bc counsels had been prevented from giving very important material 2) ✗ Judge was racist → showing how racism was ingrained in Aus society 3) ✓ Presence of protestors made the judge change his mind 	<ul style="list-style-type: none"> • Union leader: “I believe the [union’s strike] has been the main reason for the court changing its mind.”
<ul style="list-style-type: none"> 1) ✗ M merely held strong views on the trial, and felt it focussed on the wrong issues ≠ no tendency to undermine. 2) ✗ Commenting on racism in Aus + society generally, not a personal attack on the judge/court. 3) ✓ Implied that judge was overawed to take another court of action → compromises public confidence in courts administering the law fearlessly 	<ul style="list-style-type: none"> • Implied judge changed his mind + bowed to pressure in making its decision bc of unions • As a union leader with an important office, members of the public would believe his statements and perceive courts were influenced by union pressure.
✓ <i>Wade</i>	✓ <i>Fitzgibbon</i>
<ul style="list-style-type: none"> • Brochure title page: grotesque monkey-like effigy of bewigged judge + desk with wads of \$ notes 	<ul style="list-style-type: none"> • Publication of protested that alleged a man was only imprisoned bc he wanted to see his children.
<ul style="list-style-type: none"> • Implied judge bowed to wealth & influence of a litigant and decided in favour of him • Brochure was to be circulated to influential media 	<ul style="list-style-type: none"> • Report left readers with strong impressions that non-custodial parents (eg fathers) were jailed by Fam Cts bc they wanted to see their children • Gross distortion of the facts and role of F Ct • Man had been jailed for repeated breaches on non-molestation orders protecting his wife (but not discussed in article).

Defences

Fair Comment or Truth

- [A] will attempt to argue that their public comment, which imputed a judge's lack of impartiality, was a “**fair comment for public benefit**” and not necessarily scandalising contempt (*Nicholls*).
- Fair comment = honest & rationally based criticism, made in good faith, fairly conducted, factually accurate (cf *Fitzgibbon*) – *Hoser*.
 - o Not distorted by malice
- Eg concerns about the capacity of a judge in dementia → justifiable & neutralises otherwise scandalising contempt
- *Besim* [2017]: ABC article commented on the gap between NSW and Vic sentencing for terrorism. Quoted 3 federal MPs:
 - o “Comments by senior members of courts embracing shorter sentences on terrorism are deeply concerning. Andrews govt should not allow ideological experiments in the face of terrorism threat”
 - o “Attitude of judges which has **eroded any trust that has remained in our legal system**”
 - o “Our judiciary should focus more on victims and less on rights of terrorists”
 - o “Some of **judges are divorced from reality**” (similar to *Bell v Stewart*)
- Ministers retracted their comments & apologised. Ct didn't institute contempt proceedings.