

A- (would have been clear A, if not for awkward writing)

General Comments

1. Analysis: You did very well to home in on the main issue regarding justification. And because you did, you had the time and space to deal with the law in detail and to go through (carefully and convincingly) the position in different jurisdictions. With the exception of over-reading Vidal, your understanding and use of the cases was quite good.

I thought the RA was just a bit cursory; is it quite clear that the defence would apply without regard to whether one actually thought that the information was **true at the time that one posted the statements**? This comment is a bit of a nitpick and is given in the context that you had picked your issues carefully and therefore (in my view) had more than enough words to flesh out other points as necessary. In *that* context, the RA was slightly sparse.

2. Writing: Constant dropping of articles (*Nick: oops! In my defence, I was rushing off to the airport and kind of did a hasty job in trimming words*) and awkward word choice.
3. Organisation: Clear and logical at both macro level (memorandum format) and micro level (CRuPAC). Paragraphing was also good, although I did wonder if you could have been a bit more creative in grouping the "for" and "against" jurisdictions (see specific comment below).
4. Overall: Good work. Some issues with writing/word choice.

TO: Nicole Chan

FROM: Litigation Team A

DATE: September 14, 2011

FILE: John Clark

RE: Contempt of Court

ISSUE

Will the courts allow the defence of justification for Clark, given that he scandalized the courts by posting, online, allegations that Justice McNee-Toh took bribes, which turned out to be true?

Nicholas Tong 10/17/11 7:53 PM

Comment [1]: El: Nice start. This statement of the issue homed in onto the main issue. Good work.

BRIEF ANSWER

It is likely that after considering foreign jurisdictions the courts will allow the defence of justification for Clark and acquit him of charges because his allegation turned out to be true.

Nicholas Tong 10/17/11 7:54 PM

Comment [2]: El: Slight nitpick. This was probably not a very useful/informative phrase. What do you mean by "after considering other jurisdictions"? If you mean that the court will likely follow the rule in other jurisdictions, say so. Indeed, perhaps there was no need to even include this phrase; after all, everything will be explained in the discussion section, yes? Nothing wrong with the sentence. Just that you might want (in your review process) to trim even more and/or to make every single word work for you.

FACTS

Clark works at the Supreme Court. He came across a letter written by Tan, who is an accountant in a company which was involved in a trial presided over by Justice McNee-Toh. Tan realised that the company had bribed Justice McNee-Toh. She decided to send a letter with her suspicion to the Registrar of the Supreme Court. He then posted the contents online because he had been upset over work. He had not

Nicholas Tong 10/17/11 8:06 PM

Comment [3]: El: This was not the clearest statement of the facts. Somehow, the story didn't flow very well (see some of the specific comments below). Perhaps you had over-edited?

Nicholas Tong 10/17/11 8:06 PM

Comment [4]: El: This was another example where the story didn't come out so clearly. While a person who already knew the plot (so the speaker) would understand what Tan's being upset over work had to do with anything, it would probably not have been clear to anyone else.

known if the complaint in the letter was correct, and had not taken any steps to investigate the allegation himself. It turned out that the allegation was true and Justice McNee-Toh resigned shortly after Clark's post.

DISCUSSION

Clark's act of posting, online, allegations that Justice McNee-Toh took bribes, satisfies the required elements for the offence of scandalizing the courts: (1) *mens rea* (he intended to publish it) and (2) *actus reus* (his act posed a real risk of undermining public confidence in the administration of justice, and would hence constitute scandalizing the courts under the "real risk" test, which is settled law under *Shadrake Alan v Attorney-General* [2011] SGCA 26). Clark fails in applying fair criticism because his act was done without rational basis (did not know if allegation was true and did not investigate) and good faith was lacking (posted it online because he was upset over work). The remaining issue is whether the defence of justification would be available to him as his allegations turned out to be true.

Nicholas Tong 10/17/11 8:06 PM

Comment [5]: El: A slightly overlong sentence, although your use of numbering and logical points made it better.

Defence of Justification

It is likely that the courts will allow the defence of justification for Clark and acquit him of charges because his allegation turned out to be true. (Improved paragraph: Clark will likely be able to invoke the defence of justification.)

Nicholas Tong 10/17/11 8:06 PM

Comment [6]: El: (on entire paragraph): I really liked how you used this introductory paragraph to deal very quickly with the less controversial points. Even though I had some quibbles (see above) with crafting, this was generally a good decision executed well.

The court will acquit the accused of contempt relating to scandalizing the courts if the allegation is proven to be true (*Solicitor-General v Radio Avon Ltd*, [1978] NZLR 225; *R v Kopyto*, (1987) 62 OR (2d) 449 (Ont CA); *Re Duncan*, [1958] SCR 41).

Currently in Singapore, there is neither appellate court decision nor statutory provision that settles the defence of justification for contempt. In *AG v Chee Soon Juan*, [2006] 2 SLR(R) 650 (HC), the court was against admitting the defence of justification as it would "give malicious parties an added opportunity to subject the dignity of the courts to more bouts of attacks" (*Chee*, [47]). While the judge in *AG v Shadrake Alan*, [2011] SLR 445 (HC) agreed with *Chee*, he also mentioned that he could not accept that a court would regard as contemptuous a statement of fact which is true (*Shadrake 1*, [67]). Because of this lacuna in law, courts are likely to look towards foreign jurisdictions for guidance.

Canada

Canada accepts justification as a defence. In *Kopyto*, Dubin J. stated that "truth is a defence to a charge of contempt of court by scandalizing the court" (*Kopyto*, [46]). It would be contrary to public policy to deprive an accused person of the opportunity to prove the truth of what he said when it could have advanced the public interest (*Kopyto*, [48]). Cory J. considered an identical situation to the present case and thought it would be against justice and fairness to refuse the defence of truth

(*Kopyto*, [261]). Furthermore in *Duncan*, the court, in considering the allegation of contempt, entertained Duncan's defence of truth (*Duncan*, 45).

New Zealand

New Zealand may accept justification as defence. In *Radio Avon*, the judge alluded to the possibility of applying said defence. (*Radio Avon*, 230).

El's comments on New Zealand & Canada paragraphs: Given that there didn't seem to be much to say about the New Zealand position and keeping in mind that you want to advance a thesis (rather than a topic) with each paragraph, I wondered if you could have made better use of these two paragraphs by combining them. If so, what might be a good thesis sentence?

UK

UK rejects justification as defence. In *R v Vidal*, *The Times*, 14 Oct 1922, the court dismissed Vidal's objection that he should be prosecuted for publishing criminal libel, which he would have tried to prove that his allegation was true. That the defence of justification was not available to a charge of publishing defamatory libel indicates UK's position in relation to contempt.

El's comments: Read too much into the case.

Australia

Australia rejects justification as defence. In *Gallagher v Durack*, (1983) 152 CLR 238 (HCA) and *R v Fletcher; ex parte Kische*, (1935) 52 CLR 248, justification was not a defence for publishing seditious libel if the statements are "unjustified",

"unwarrantable" or "baseless" (Gallagher, 244; Fletcher, 257). This indicates Australia's position in relation to contempt.

Prima facie, there is no clear consensus (2-2) among foreign jurisdictions that the defence of justification should be available to contempt. However, while English cases are highly persuasive, *Vidal* is obsolete and may not reflect contemporary judicial attitudes in UK. As for Australia, Phang interpreted the cases to mean that a court will exonerate the accused unless it finds the remarks "unjustified", "unwarrantable" or "baseless" (*Shadrake 2*, [71]). This serves a similar function as the defence of justification because it protects the accused from conviction where there is clear basis in fact. While *Chee's* point about how allowing justification may invite judicial guerrilla warfare is valid, the offence of scandalizing the courts is quasi-criminal and punishable by imprisonment (*Gallagher, Chee, Vidal*) – it appears only proportionate to allow justification as defence. The decision in *Shadrake 2* to adopt the "real risk" test, departing from precedent, suggests that the current Court of Appeal is willing to develop the law more progressively. In all, it is likely that the courts will allow justification as defence.

Applying the rule to case facts, Clark can use justification as defence against his charges and acquit himself because his allegations turned out to be true. Can have more meat.

Nicholas Tong 10/17/11 8:22 PM

Comment [7]: El: Do you have any evidence to support this?

Nicholas Tong 10/17/11 8:21 PM

Comment [8]: El: quite good reasoning. I especially liked how you used Phang JA's comments and also the trend represented by the CA's *Shadrake* decision.

In conclusion, it is likely that the courts will allow justification as defence in contempt after considering cases in foreign jurisdictions. Clark will thus be acquitted of the charges.

(999 words)

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