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THE SETTLEMENT OF LIBEL CASES OUT OF COURT

by

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Introduction

Since the establishment of the judicial system about 122 years ago, it has been the consistent policy of Ghana's law makers to confer jurisdiction on the courts and their officials to promote the amicable settlement and reconciliation of cases brought before them. Reference may be made, for instance, to Sections 114 - 116 of Cap 4 of the Laws of the Gold Coast 1951 edition entitled "Reconciliation", marginal headings "courts to promote reconciliation, in civil cases, and in criminal cases"; Act 29, 1960, Courts Act, 1960 SS. 84-86; and now the Courts Act, 1993 Act 459 SS. 72 (1) and (2) and 73, as quoted below.

Courts to Promote Reconciliation in Civil Cases

72 (1) "Any court, with civil jurisdiction and its officers *shall* promote reconciliation, encourage and facilitate the settlement of disputes in an amicable manner between and among persons over whom the court has jurisdiction."

(2) "When a civil suit or proceeding is *pending*, any court with jurisdiction in that suit may promote reconciliation among the parties, and encourage and facilitate the amicable settlement of the suit or proceeding."

Reconciliation in Criminal Cases

73. "Any court, with criminal jurisdiction may promote reconciliation, encourage and facilitate a settlement in an amicable manner of any offence not amounting to felony and not aggravated in degree, on payment of compensation or on other terms approved by the court before which the case is tried, and may during the pendency of the negotiations for a settlement stay the proceedings for a reasonable time and in the event of a settlement being effected, *shall* dismiss the case and discharge the accused person."

The ambit of this enactment calls for some reflection. All competent courts and their officers are empowered to promote reconciliation (i.e. settlement) of any civil case before them. Three further points may be noted about S. 72 (1) and (2).

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(1) The power conferred on the courts and their officers is mandatory, not just permissive or enabling.

(2) The courts and officers may settle the case either at the commencement of the litigation or in the course of the litigation, giving the parties engaged in reconciling their differences or dispute out of court, enough time and opportunity to do so. The courts' duties are to promote, encourage and facilitate a settlement of the pending dispute between the parties.

(3) The Ghanaian concept of customary settlement or "arbitration" is well known and recognised as valid and binding in our Ghana customary laws, once

(a) there is a voluntary submission of the dispute to an independent authority or persons not necessarily in compliance with strict formal legal procedures;

(b) both parties and their witnesses (if any) are heard;

(c) an arbitral award is made by the customary arbitrator which

(d) if accepted by both parties by the token acceptance of "aseda" (i.e. thank offering to the "arbitrator" who heard the complaint), makes the arbitral award final and binding upon them.

It would be noticed that the duty of the selected "arbitrator" is not so much to lay down strict legal rights and penalize their infringement, as to produce an award which, whilst satisfying the basic requirements of custom and fairness, would be acceptable to both parties. The essence of customary arbitration is not the original voluntary submission to settlement, but the acceptance by the parties of the arbitral award. The aim of the out-of-court amicable settlement is not the pursuit of strict legal rights and penalties for the alleged crime or civil tort, but the reconciliation of the two parties and the removal of the disturbance to the public peace as a result of a crime or a tort.

(4) Fourthly, the rationale underlying an amicable settlement is the public policy need for eliminating time-wasting, expensive and lengthy litigation, thereby saving time and expense involved for both the parties in protracted litigation and the State, whose concern is the finality of litigation. As the maxim goes, *"interest rei publicae ut sit finis litis"* (i.e. it is in the interest of the State that there shall be an end to litigation).

(5) Fifthly, the Court is required mandatorily to promote, encourage and facilitate amicable out- of-court settlement of pending civil cases as well as non-felonies.

Usually in civil cases, it is the parties and their counsel who take the initiative of seeking out-of-court settlements. However, the court in its wisdom may take the initiative by recommending the advantages of possible amicable settlements. No matter the source of the initiative, the submission to informal arbitration must be consensual and voluntary.

Reconciliation in Criminal Cases

For similar public policy reasons, the State under Section 73 of Act 459 encourages reconciliation of pending criminal cases provided they are neither felonies nor offences aggravated in degree, through the payment of compensation for the aggrieved complainant or on other terms approved by the trial court. The Court may in such appropriate minor criminal prosecutions adjourn the hearing to enable negotiations for a settlement to proceed between the complainant and prosecutor on the one side, and the accused person and his legal advisor on the other. If an out-of-court settlement is achieved, the Court is mandatorily required to *dismiss* the criminal case and discharge the accused person forthwith.

Incidentally, the main difference between a felony and a misdemeanour is that, unless the enactment creating the offence has specified a particular penalty in the event of a breach, a misdemeanour attracts a penalty of 3 years' imprisonment maximum, while a first degree felony atfracts a

maximum penalty of life imprisonment, and a second degree felony carries a term of imprisonment not exceeding 10 years - see S 296/ Act 30 of 1960 as amended by Act 261/65.

Punishment for Criminal Libel

Criminal libel attracts two kinds of punishment, depending on whether it is classified as *intentional* libel or *negligent* libel; the former classified as a felony, being punishable with (originally, by S. 112/ Act 29) 100 pounds fine; and the latter, categorised as a misdemeanour and made liable to a lesser fine or a maximum term of imprisonment as for a misdemeanour.

Out -of -Court Settlement of Negligent Criminal Libels

For our present purpose of exploring out-of-court settlement of criminal libels, it must be noted that only criminal libel cases, not otherwise aggravated, can be settled out of court, whether these cases are pending in the lowest trial courts or in the highest, the Supreme Court of Ghana. By virtue of S.73 of the Courts Act, 1993 (Act 459), all courts hearing this category of criminal libel cases (as well as any civil libel cases by virtue of S.72/ Act 459) are mandated to *promote* reconciliation, *encourage* and facilitate a settlement in an amicable manner; and in connection therewith, these courts are empowered to order the payment of *compensation* by the accused to the complainant or on other terms approved by the Court in question; and upon *acceptance* by the complainant of the proposed settlement terms, the Court *shall* dismiss the criminal case and discharge the accused.

In this way, the hurt or outraged feelings of the complainant should be assuaged, while the *compensation* awarded should signify society's disapproval of the misdemeanour, while of course compensating the complainant somehow for the harm endured and redressing the damage done to his hitherto unsullied reputation.

Main Defences to Criminal Libel Cases

The defences available to a person accused of criminal libel are next mentioned briefly for the guidance of all lay arbitrators and the general public. The relevant law is technical; and an attempt has been made to state the main defences in simple terms divorced from the legal jargon in which they are encrusted.

It is not the intention thereby to dispense with the need for consultation of skilled legal practitioners whenever a journalist or media house or indeed any other person is saddled with a criminal libel case. Indeed, later on, this paper advocates the practical utility and advisability for media houses to retain legal counsel of their own on a permanent basis as the lesser of two evils, and the taking out of an insurance policy by the media houses against libel actions and prosecutions.

The main defences to a libel action or prosecution are:-

i. *Justification*
ii. Absolute privilege
iii. Qualified privilege
iv. Fair comment
v. Apology and amends
vi. Unintentional or innocent publication

Chapter 7 (SS. 112 - 119) of the Criminal Code Act 29 contains the local Act 29/1960 Code on Criminal Libel, with the categorization of negligent and intentional libels in S.112 (1) and (2), 113 and the definition of the crime and the ingredients in SS 114, 115 - 119, respectively. The absence of any of these vital ingredients of the crime naturally results in an acquittal.

Justification

The plea of justification is to the effect that the alleged defamatory publication is true. The accused undoubtedly bears the onus of proving the truth of the defamatory publication, both the words and the innuendo pleaded in the indictment or charge-sheet. If the accused succeeds in justifying his alleged defamatory publication, he goes scot-free; for "the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not to possess" - per Littledale in *McPherson v Daniels* (1820) - a civil case. In this area of the law, the public policy

interest in free speech prevails over the individual's interest in his unblemished reputation.

It is not necessary, however, to prove that the statement is literally true in every detail; it is enough if the essence of the imputation is true and the erroneous or defamatory part is insignificant. For example, it is no valid justification for the accused to plead that he only stole ¢100 out of ¢1,000 entrusted to him!

At common law, truth was held to be no defence to an indictment for libel. However, S.6 of the Libel Act 1843 - an imperial statute of general application to Ghana, being part of the existing law (Art. 11 (1) (d) of the 1992 Constitution)—made the publication of the truth, however defamatory, no longer a criminal offence if its publication was for the public benefit.

With respect to the current local spate of published rumours alleged to be false and defamatory, it is no justification to assert that these rumours are probably true because of their currency and nationwide repetition. Republication of a false defamatory report or rumour does not make it any the less defamatory and criminal. On the contrary, it aggravates the original sin and the penalty.

To constitute justification and a defence to the charge, the alleged facts or the substratum whereon the comment is based must be proved to be true.

Absolute Privilege

Absolute privilege from defamation attaches not only to parliamentary papers, Hansard, committee reports, and statements made in Parliament by an MP or Speaker; but also to fair, *accurate* and contemporaneous reports of public judicial proceedings published in newspapers as well as any statement, written or verbal, made in the course of, and with reference to, judicial proceedings by any judge, juror, party witness or advocate; statements made by one officer of State to another in the course of, and concerning, official duty; in addition to communications between spouses during marriage, and between lawyers and their clients.

This absolute privilege has been conceded on public policy grounds to ensure freedom of speech, fair and proper administration of justice, the effective conduct of public affairs, and due performance of judicial, legislative or official duties. Reference may be made to S.117/Criminal Code (Act 29) for when publication of defamatory matter is deemed absolutely privileged, and to S.118/Act 29 for provisions on conditional or qualified privilege.

Qualified Privilege

In reference to qualified privilege a defamatory statement made on a *privileged occasion* is entitled to qualified privilege if published where the author has an interest or duty — legal, social or moral — to make it to the person to whom it is made; and the person to whom it is made has a corresponding interest or duty to receive it. This reciprocity is essential - see per Lord Atkinson in *Adam v Ward* (1917) A.C. 309, 334, JCPC; and see the illustrative local case of *Adapoe v Pospisil* (1974) GLR 327.

To establish this defence, three elements must be present : the occasion must be fit, the matter must have reference to the occasion, and it must be published from right and honest motives.

The proper meaning of privileged communication is only this: that the occasion on which the communication was made rebuts the inference prima facie arising from a statement prejudicial to the character of the plaintiff and puts it upon him to prove that there was malice in fact — that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made.

Fair Comment

A fair comment on a matter which is of public interest or is submitted to public criticism, is not actionable. Three elements are necessary for the defence of fair comment:

(1) Comment,

(2) Fair comment, and

(3) Fair comment on a matter of public interest

This defence is one of the aspects of the fundamental human right of freedom of expression; and "the courts are zealous to preserve it unimpaired. It must not be whittled down by legal refinements" (see *Slim v Daily Telegraph* (1968) 2QB 157, 170 per Lord Denning, M.R.

To be within the defence of fair comment, the statements complained of must be published *honestly* as criticism and as the real opinion of the speaker or writer, and not from some malicious motive. Fair comment means *comment honestly believed to be true*, and not inspired by any malicious motive.

"The question is not whether the comment is justified in the eyes of the court, but whether it is the honest expression of the commentator's real view and not mere abuse or invective under the guise of criticism" per Lord Porter in *Turner v MGM* (1950) ALL E.R. 449, 461.

Section 6 of the 1952 Defamation Act (arguably a statute of general application) introduced the *'rolled-up plea'*: "In so far as the statements complained of are statements of fact, they are true in substance and in fact, and in so far as they consist of comment, they are fair comment on a matter of public interest."

Apology and Amends

Generally at common law, the offer or the making of an apology is no defence to an action for libel, although it may be given in evidence in mitigation of damages. But by S.2 of the *Libel Act 1843* (a statute of general application in Ghana), in actions for libel contained in a public newspaper or periodical, the defendant may plead that it was inserted without actual malice and without gross negligence, and that before the commencement of the action or at the earliest opportunity afterwards, he inserted in the newspaper or periodical a full apology or, if the periodical is ordinarily published at intervals exceeding one week, had offered to publish such apology in any newspaper or periodical selected by the plaintiff. Every such defence must be accompanied by a payment of money into court by way of *amends*.

Unintentional Defamation

Section 4/Defamation Act of 1952, which introduced the novel defence of unintentional defamation, provides that a person who has published defamatory matter of another person may, if he claims that the words were published by him innocently in relation to that other person, make an offer of *amends*. Such an offer must be expressed to be made for the purpose of this enactment and must be accompanied by an *affidavit* specifying the facts relied upon by the person making it to show that the words in question were published by him *innocently* in relation to the aggrieved party.

An offer of amends means :

i) An offer to publish a suitable correction of the words complained of, and a sufficient apology to the party aggrieved in respect of those words

(ii) Where copies of the document containing the defamatory matter have been distributed by, or with the knowledge of the person making the offer, to take such steps as are reasonably practicable on his part for notifying persons to whom copies have been so distributed that the words are alleged to be defamatory.

(iii) If the offer of amends is *accepted*, and duly performed, no proceedings for defamation by the party aggrieved shall be taken or continued against the offerer. The Court may award costs on an indemnity basis plus reasonable expenses incurred.

(iv) If the offer of amends is *rejected*, then it shall be a defence in any defamation action against the offerer to prove that the words were published by the defendant *innocently* in relation to the plaintiff, and that an offer was made as soon as practicable after he received notice that the published words were, or might be defamatory of the plaintiff, and has not been withdrawn.

It seems that if the editor of a newspaper publishes an anonymous letter containing statements *ex facie* innocent but in fact not so by reason of the fact that the author is secretly actuated by malice,

the editor cannot make use of this statutory defence. The crucial question in all cases is whether the words were published innocently or not.

Settlement Out of Court — Procedure

If the parties to the defamatory action or their legal advisers, as instructed by their clients, are desirous of settling the case out of court, they should so inform the trial Judge at the earliest opportunity. If need be, the Judge will adjourn the hearing of the case to a date convenient to the Court and both parties, who may request further adjournments should the need arise subsequently.

When an agreement to settle is finally reached, the Judge will request the terms of the agreed settlement to be recorded in writing and *signed* by both parties and counsel. If money compensation is sought, and the amount agreed upon, this fact should also be recorded and duly signed by both. The Judge will then paste the signed settlement in the judgement book, after pronouncing and counter-signing it as the judgement of the Court, duly sanctioned by him. This signed consent settlement, endorsed by the Court is, as a general rule, final, unappealable and non-reviewable (save for fraud).

In this way, the Court would have discharged its statutory duty of promoting reconciliation among the parties by facilitating the parties' voluntary settlement; and the public policy objective of seeking finality in litigation would have been achieved.

One or two general observations and suggestions may be made here.

General Recommendations

1. *Legal Retainer*

   It is obvious from the foregoing that the law of defamation is technical and best handled by a legal practitioner who specialises and is skilled therein. Without prejudice to any concerted action planned for them by their principals and the Media Commission, PRINPAG members would be humbly recommended to adopt the sensible practice of *legal retainer* for the group, or individual members who can afford the reasonable retainers of competent legal professionals willing to offer their services in this respect.

2. *Insurance Against Defamation Suits*
   Another useful suggestion worthy of consideration is the advisability of press houses taking out insurance policies against defamation actions and prosecutions. These libel cases, being occupational hazards, deserve to be fully anticipated and warded off, or else nipped in the bud in out-of-court settlements.

   Finally, practising journalists and the media generally are advised that, as the adage goes, prevention is better than cure, even in the unpredictable field of defamation litigation. If media practitioners would check and cross-check the facts, allegations, reports and stories before rushing to press with what may look like scoops, they would save themselves a lot of money, time and bother in defending or settling out of court the barrage of libel actions, some of them plainly of the gold digging variety, which are currently almost submerging many press houses.

Postscript. A newspaper published on the day this paper was written, carried a topical story with the title : "Avalanche of Libel Cases in Court."

The pressing need for out-of-court settlement of libel cases can hardly be overemphasised.

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