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Risks in Litigation

The Westmoreland and Sharon Cases Show Cost on Both Sides May Be High

By DAVID MARGOLICK

In some ways, the course of General William C. Westmoreland's battle against CBS, which concluded Sunday when his $120-million libel suit against the network was withdrawn, paralleled the tortured path of the war with which he is so closely identified.

News Analysis

At the Federal District Courthouse in Manhattan as in Southeast Asia, General Westmoreland waged an expensive, time-consuming battle against a powerful adversary, whose strength he may have underestimated.

Coming so soon after the very different outcome in Ariel Sharon's libel suit against Time magazine, the Westmoreland withdrawal from the CBS libel suit was seen as a gain for the media, although not without a high price.

"CBS has won a great victory, but it sustained two years of intense public criticism as well as enormous financial costs," said Floyd Abrams, a specialist on press law. "Large libel suits are really death grips in which parties clutch each other for months if not years, at enormous pain and expense to both of them."

"Libel plaintiffs will be reminded of something they may have forgotten: that someone who brings a libel suit may suffer a shattering loss of reputation arising out of the litigation itself," said Mr. Abrams. "We haven't heard so much about that recently."

Professor Vincent Blasi, a specialist in constitutional law at Columbia Law School, noted another consideration. "This case resurrects the most important deterrent to libel actions: the fear that the defendant will make his case more effectively, more hurtfully, more credibly at trial than in print or on the air."

"Recently," he continued, "there's been a kind of promiscuity in bringing libel suits, based on a feeling that even if the evidence was fairly flimsy or if the verdict were eventually overturned, the lawsuit had a certain publicity value. This case ought to be terribly sobering in that regard."

Still, for CBS the experience was not without its costs. The network paid millions of dollars to vindicate itself, a process in which its news-gathering procedures and the news-gatherers themselves were bared and scrutinized as never before.

As the Westmoreland case came to its abrupt end, two and a half years after it was first filed and 18 weeks after it went to trial, it left many questions hanging.

Among them: Given its politically charged nature, should the case have gone to court in the first place? Why did the parties opt out now rather than await the jury's verdict? And what, if anything, should be done to make libel actions less costly, so that newspapers and broadcasters with fewer resources than Time or CBS can defend themselves?

At first blush, the Sharon and Westmoreland cases, which were heard simultaneously six floors apart at the Federal courthouse on Foley Square, had much in common. Each pitted a military man against a media giant: each focused on purported misconduct during a far-off, unpopular war.

The similarities stop, however, when one considers the charges the two men attempted to refute. For Mr. Sharon, it consisted of one specific statement: that an Israeli commission had found he played a role in the 1982 massacre of Palestinian civilians in Lebanon.

This he managed to do. And although he ultimately failed to prove that Time had lied or acted recklessly — a showing required under the United States Supreme Court's landmark libel ruling in New York Times v. Sullivan — a public unconcerned with legal niceties deemed him the victor in the case. General Westmoreland, however, was faced with the far more difficult task of refuting an entire historical thesis: that he conspired to mislead American leaders on enemy troop strength in Vietnam. It was an area where evidence was contradictory, where fact and opinion were intermingled.

In the end, he not only failed to conclude his case, but publicized even more widely the accusations of which he had complained.

There was genuine puzzlement yesterday over the timing of General Westmoreland's decision, particularly since the recent, damaging testimony against him — by General Joseph A. McChristian and Col. Gains Hawkins — could not have been much of a surprise. Both had made similar statements on the original CBS broadcast.

General Westmoreland's lawyer, Dan Burt of the conservative Capitol Legal Foundation, denied that the fact that the foundation is now $500,000 in debt played a part in the decision to settle.

Mr. Blasi speculated that the decision may have been a belated reaction to the prospect that Judge Leval — like Judge Abraham D. Sofaer, who presided over the Sharon case — may have asked the jury to rule separately on the questions of truthfulness, defamation and malice.

General Westmoreland, he said, may simply have been unwilling to let a panel of his peers ratify CBS's thesis.

"He may have felt he'd really have egg on his face if a jury ruled against him on falsity," Mr. Blasi said.

In the end, General Westmoreland agreed to something that CBS and its lawyers, Cravath, Swaine & Moore, maintained all along: that, as the joint statement issued by the parties stated, the "court of public opinion," and not a court of law, was the appropriate forum for the dispute.

One of the ironies of current libel law is that while it is extremely difficult under the Sullivan rule for a public figure to win a libel action, it is relatively easy to get a case to the jury. This, both Mr. Blasi and Mr. Abrams said, was a formula for inefficiency — one that could be corrected were the courts freer to dismiss libel cases prior to trial.

Five years ago, however, in the famous "Footnote 9" of Hutchinson v. Proxmire, Chief Justice Warren Burger wrote that given the complex question of state of mind involved in such libel actions, the cases were best tried.

A Stanford Law School professor, Marc Franklin, suggested that news organizations could fend off libel actions altogether by granting aggrieved persons a chance to reply — albeit earlier and less begrudingly, he said, than CBS did with General Westmoreland.

"Not everyone who comes in off the street should be given equal time, but the proper treatment in cases where truth and falsity are murky and there is a morass of contradictory testimony is to let the plaintiff state his perceptions," he said. "This was a case for more free speech, not for a lawsuit."