

NEW YORK TIMES
19 February, 1985ARTICLE APPEARED
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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C. Westmoreland's battle against CBS, which concluded Sunday when his \$120-million libel suit against the network was withdrawn, paralleled the tortured path of the war with which he is so closely identified.

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 begrudgingly, 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."

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Vietnam to Courtroom

Gen. William C. Westmoreland, who was commander of United States forces in Vietnam from 1964 to 1968, filed a \$120 million libel suit in 1982 against CBS over a documentary that stated that his command conspired to underestimate reports of enemy troop strength before the Tet offensive of January 1968. Here are some of the events that led to the lawsuit, which General Westmoreland formally ended on Sunday night.

1964

June 20 — General Westmoreland is named commander of United States forces in Vietnam, which number fewer than 18,000 advisers and support personnel.

1965

July 13 — Maj. Gen. Joseph A. McChristian becomes chief of military intelligence on General Westmoreland's staff.

1966

December — Military and Central Intelligence Agency officers in Vietnam begin a review of enemy strength estimates.

1967

April — General Westmoreland visits Washington, gives President Johnson an optimistic assessment of the war.

May 19 — General McChristian prepares a cable to be sent to Washington on the results of a five-month intelligence study that puts enemy strength at more than 500,000 troops. General Westmoreland orders General McChristian not to send the cable.

May 28 — Col. Gains Hawkins, a senior intelligence officer, meets with General Westmoreland and is told, according to the colonel's later testimony, that the higher figures for enemy strength are "politically unacceptable."

June 1 — General McChristian is transferred from Vietnam and replaced by Lieut. Gen. Phillip B. Davidson.

June and July — Colonel Hawkins orders subordinates to cut estimates of enemy strength. He will later testify that this was done to conform to a ceiling imposed by General Westmoreland.

August — Military and C.I.A. analysts meet in Langley, Va., and disagree on enemy strength. General Westmoreland's staff argues for totals under 300,000; C.I.A. officials, including Samuel A. Adams, favor more than 500,000.

Sept. 12 — Negotiations between military and C.I.A. analysts lead to acceptance of the military command's lower figures.

Nov. 13 — General Westmoreland sends President Johnson and the Joint Chiefs of Staff figures showing enemy strength at 223,000 to 248,000 troops.

Nov. 21 — Walt W. Rostow, special assistant to President Johnson, warns the President in a memo that the press might "latch onto the previous underestimate and revive credibility gap talk."

Nov. 22 — General Westmoreland tells reporters that Communist strength has declined from 285,000 in 1966 to 242,000 in 1967.

1968

Jan. 30 — Communist forces launch the Tet offensive, striking Saigon and 39 other cities and towns in an attack that creates turmoil and comes to be regarded as a turning point of the war.

Jan. 31 — Mr. Adams, the C.I.A. analyst, tells his superiors that the compromise figures were "a monument of deceit." He accuses the general's staff of "outright falsehoods" that "basically misinformed policy makers of the strength of the enemy."

July 3 — General Westmoreland becomes Army Chief of Staff and is replaced as commander in Vietnam by Gen. Creighton Abrams.

1973

Jan. 11 — Mr. Adams demands an investigation by the C.I.A. on the handling of the enemy strength figures, then resigns from the agency.

April — Mr. Adams testifies at the Pentagon Papers trial of Daniel Ellsberg that the military deliberately cut enemy strength figures. He later asks Representative Paul N. McCloskey, Republican of California, to keep a file of Westmoreland-C.I.A. cables and other documents.

April 17 — Representative McCloskey charges that the military "deliberately concealed" the size and nature of the enemy before the Tet offensive.

April 30 — Saigon falls to the Communists.

May — Harper's magazine publishes article by Mr. Adams charging that General Westmoreland's command "fabricated" enemy strength figures. The article is edited by George Crile 3d, who will join CBS as a producer in 1978.

September-December — A House committee investigates Mr. Adams's charges.

1976

January — The House committee reports that the 1967 estimates dropped numbers "in what appears to have been an arbitrary attempt to maintain some ceiling" on estimates of enemy strength.

1980

Nov. 24 — Mr. Crile, now a CBS producer, proposes a documentary on the enemy troop strength issue. It is accepted and Mr. Adams, now writing a book on the subject, is later hired as a CBS consultant for the project.

Continued

1981

CBS creates a 90-minute, \$250,000 documentary. It interviews more than 80 people, 13 of them on camera, including General Westmoreland and Mr. Adams.

1982

Jan. 23 — "The Uncounted Enemy: A Vietnam Deception" is shown on "CBS Reports" to a national audience estimated at 9.6 million.

Jan. 26 — General Westmoreland denounces the program as a "vicious, scurrilous and premeditated attack on my character and personal integrity." He demands, but does not receive, an apology from CBS.

May 29 — An article in TV Guide, "Anatomy of a Smear," criticizes the CBS procedures used in making the documentary.

July 8 — A CBS internal study finds that the documentary suffered from "imbalance" and that there were editing mistakes and other violations of the network's standards, but it stands by the program.

Sept. 13 — General Westmoreland files a \$120 million libel suit, charging that CBS defamed him by falsely accusing him of lying to the President and the Joint Chiefs of Staff.

1984

Sept. 24 — Judge Pierre N. Leval denies a CBS motion to dismiss the case, saying there are sufficient questions to warrant a trial.

Oct. 9 — The trial begins in Federal Court in Manhattan.

November — General Westmoreland testifies for nine days, arguing his case and denying that he had acted improperly.

1985

Feb. 12 — Colonel Hawkins testifies that General Westmoreland imposed a "dishonest" ceiling on enemy troop figures in 1967 because higher numbers were "politically unacceptable."

Feb. 18 — Lawyers announce a settlement in which General Westmoreland withdraws the suit, CBS pays no damages and stands by its documentary, and each side pays its own legal expenses.