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ARTICLES

THE TRUTH DEFENSE—LESSONS LEARNED FROM *WESTMORELAND v. CBS*

Alexander Alben †

In the post *New York Times v. Sullivan*¹ era, libel attorneys defending media corporations have earned their stripes establishing the absence of “actual malice” in cases involving public figures. While lip service is always paid to the notion that “truth is an absolute defense” in a libel or slander action, few media defendants, even those with deep pockets, are willing to expend the time and legal fees necessary to establish the underlying facts required to prevail in a “truth defense.” Even when an Errors and Omissions policy² foots the defense bill, it makes sense to dismiss a libel claim at the pleading or summary judgment stage, rather than risk the vicissitudes of trial.³

Cases arise on occasion where a media defendant does not seek the easy way out of libel liability. Company executives may believe that the prestige of the news organization is on the line and that only proof of the “truth” of their story will restore the integrity of their organization. In rare cases, media executives may unwittingly undercut their actual malice defense by sponsoring internal investigative reports that become discoverable to plaintiff. *Westmoreland v. CBS Inc.*,⁴ was such a rare case.

This article is intended for media executives and media defense at-

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1. 376 U.S. 254 (1964).

2. Media organizations maintain Errors and Omissions insurance policies to cover claims for libel, slander, copyright infringement, invasion of privacy, right of publicity violations and various other claims flowing from alleged injuries sustained by an individual due to the content of a news story, in this case, *The Uncounted Enemy* broadcast. CBS News maintained a blanket Errors and Omissions policy that applied to the claim filed by General Westmoreland. Errors and Omissions policies generally cover legal expenses, less a deductible amount, but do not cover any punitive damages that may be awarded against a defendant.

3. The reasons are twofold: (1) juries cannot be relied upon to assiduously apply the actual malice standard, especially when they sympathize with the plaintiff, and (2) juries award punitive damages not covered by insurance.

4. No. 82-7913 (S.D.N.Y. 1984).

torneys who are responsible for making strategic decisions involved in the preparation and defense of libel actions. Based on the experience of the *Westmoreland* litigation, this article will focus on three general guidelines: (1) stand by the accuracy of the story—failure to do so invites litigation; (2) internal investigations should be conducted by attorneys in order to bring the findings within the scope of the attorney-client privilege; and (3) beware of the burden of lengthy litigation and heavy legal expenses imposed by the truth defense. This article concludes with a discussion of the merits of the settlement of the *Westmoreland* litigation on the eve of the jury's deliberations: CBS obtained a favorable settlement, but should it have held out for a favorable verdict?

I. BACKGROUND OF THE *WESTMORELAND* CASE

On January 23, 1982, CBS broadcast a ninety-minute documentary entitled *The Uncounted Enemy: A Vietnam Deception*.⁵ The documentary reported charges by a number of Army and CIA intelligence officers that in the months preceding the North Vietnamese-Viet Cong Tet Offensive of January 1968, the American military command in Vietnam, known as MACV,⁶ under the command of General William C. Westmoreland, misled the American people about the actual strength of the enemy we were fighting.⁷ The witnesses interviewed for the documentary stated that MACV carried out this deception in order to make it appear that progress was being made in winning the war of attrition against enemy forces, that the war was winnable, and that there was "some light at the end of the tunnel" in this nation's longest war.⁸

In the preface to the broadcast, correspondent Mike Wallace stated: The fact is that we Americans were misinformed about the nature and the size of the enemy we were facing, and tonight we're going to present evidence of what we have come to believe was a conscious effort—indeed, a conspiracy at the highest levels of American military intelligence—to suppress and alter critical intelligence of the enemy in the year leading up to the Tet Offensive.⁹

5. Broadcast Transcript, Joint Exhibit JX1, at 1.

6. Military Assistance Command Vietnam.

7. Broadcast Transcript, Joint Exhibit JX1 *passim*.

8. Broadcast Transcript, Joint Exhibit JX1 *passim*; McArthur interview transcript, Joint Exhibit JX2 *passim*; Lynn interview transcript, Joint Exhibit JX4 *passim*; Hamscher interview transcript, Joint Exhibit JX5 *passim*; Allen 2/20/81 interview transcript, Joint Exhibit JX6 *passim*; Allen 5/25/81 interview transcript, Joint Exhibit JX7 *passim*; Hawkins interview transcript, Joint Exhibit JX9 *passim*; McChristian interview transcript, Joint Exhibit JX10 *passim*.

9. Broadcast Transcript, Joint Exhibit JX1, at 1.

Among the sixteen allegedly libelous statements contained in the broadcast and newspaper advertising supporting the broadcast, General Westmoreland identified the conspiracy charge set forth above as "the centerpiece" of his complaint.¹⁰

General Westmoreland served as commander of United States forces in Vietnam from June of 1964 until June of 1968.¹¹ He was *Time* magazine's Man of the Year for 1965.¹² The complaint named CBS, Inc., CBS News President Van Gordon Sauter, correspondent Mike Wallace, producer George Crile, and former CIA analyst and CBS consultant Sam Adams as defendants.¹³

Perhaps no other libel case in this century attained the celebrity of *Westmoreland*. Editors of the nation's leading newspapers and magazines assigned reporters to daily coverage of the eighteen-week long trial.¹⁴ The case is estimated to have cost the parties more than eight million dollars in legal fees over a three-year period.¹⁵ CBS was covered by Errors and Omissions insurance. The Capitol Legal Foundation, a non-profit conservative legal rights organization, funded General Westmoreland's battle against the network.¹⁶ Westmoreland sought \$120 million in damages.¹⁷

Most observers agreed that the turning point of the libel trial occurred when General Westmoreland's key intelligence officers took the witness stand and testified that *The Uncounted Enemy* was a fair and accurate broadcast.¹⁸ MACV Chief of Intelligence General Joseph McChristian and Chief of MACV's Order of Battle Colonel Gains Hawkins confirmed on the witness stand what they had told the CBS cameras—that Westmoreland had rejected their higher enemy strength estimates due to concern over the political and public relations consequences of

10. Westmoreland Dep. Tr. at 4.

11. Memorandum in Support of Defendant CBS' Motion to Dismiss and for Summary Judgment at 5 [hereinafter CBS Summary Judgment Motion].

12. *TIME*, Jan. 7, 1966.

13. Plaintiff's Complaint at 1.

14. ABC's *Nightline* and Public Television's Hodding Carter devoted half-hour programs to scrutinizing the documentary. No less than five books have been written about the documentary, and at least one more is on the way.

15. *The General Ends His War Against CBS*, N.Y. Times, Feb. 24, 1985, § E, at 20 [hereinafter N.Y. Times, Feb. 24, 1985]; Hagel & Rosenstiel, *Libel Battle: From Courts to Lawbooks*, L.A. Times, Feb. 20, 1985, § I, at 1, col. 1 [hereinafter L.A. Times, Feb. 20, 1985].

16. M.A. Farber, *The Westmoreland Case: A Broken West Point Tie*, N.Y. Times, Feb. 24, 1985, at 30, col. 2 [hereinafter N.Y. Times, Feb. 24, 1985].

17. CBS Summary Judgment Motion, *supra* note 11, at 1; *Vietnam To Courtroom*, N.Y. Times, Feb. 19, 1985, at 11 [hereinafter N.Y. Times, Feb. 19, 1985].

18. K. Goldman, *Westmoreland Claims Victory, Drops CBS Suit*, Daily Variety, Feb. 19, 1985, at 1 [hereinafter Daily Variety, Feb. 19, 1985].

such higher estimates at a time when President Johnson was projecting an image of progress on the battlefield in order to persuade Congress to continue to authorize increasingly greater levels of men and materials for the war effort.¹⁹

The trial proved to be a boon for historians who had been denied access to the policymakers who ran the war.²⁰ Through subpoena power, depositions were compelled from figures such as Defense Secretary Robert McNamara and CIA Director Richard Helms, who had gone to extraordinary lengths to avoid commenting on their roles in, and their assessment of United States policy in Vietnam. In fact, the volumes of deposition testimony, exhibits and affidavits generated by the trial established an invaluable archive for students of the war.²¹ Armed with subpoenas and superior funding, the defense attorneys at Cravath, Swaine & Moore, over the course of two and one-half years, were able to develop a more comprehensive written record of the intelligence controversy than the journalists at CBS responsible for the documentary. From CBS' perspective, these efforts bore fruit when a score of CIA and military intelligence analysts provided deposition and trial testimony that emphatically supported the "evidence" introduced on the documentary.²²

When testimony in the case had nearly concluded and Judge Pierre N. Leval was about to turn the case over to the jury, the case abruptly settled. No money changed hands. CBS did not retract any of the substance of the broadcast. General Westmoreland settled for a joint statement that CBS "never intended to assert, and does not believe, that General Westmoreland was unpatriotic or disloyal in performing his duties as he saw them."²³ Commentators compared Westmoreland's "dec-

19. M.A. Farber, *Ex-Colonel Testifies for CBS at Trial*, N.Y. Times, Feb. 13, 1985, at 10 [hereinafter N.Y. Times, Feb. 13, 1985]; R. Abramson, *CBS Witness Tells a Stronger Story*, L.A. Times, Feb. 14, 1985, § I at 18 [hereinafter L.A. Times, Feb. 14, 1985]; M.A. Farber, *CBS Testimony Centers on Intelligence Briefings*, N.Y. Times, Feb. 14, 1985, at 14 [hereinafter N.Y. Times, Feb. 14, 1985]; J. Alter & L. Howard, *The General's Retreat*, NEWSWEEK, Mar. 4, 1985, at 59-60 [hereinafter NEWSWEEK, Mar. 4, 1985].

20. *Sam Adams' Vietnam Obsession*, Washington Post, Jan. 10, 1985, Style Section at 1.

21. Subpoenas and Freedom of Information Act requests to the CIA, the Department of Defense, the Defense Intelligence Agency, the Department of the Army, the LBJ Library and other government agencies yielded over 200,000 pages of documents in the litigation. CBS Summary Judgment Motion, *supra* note 11, at 295.

22. N.Y. Times, Feb. 13, 1985, *supra* note 19, at 10; L.A. Times, Feb. 14, 1985, *supra* note 19, at 18; N.Y. Times, Feb. 14, 1985, *supra* note 19, at 14; NEWSWEEK, Mar. 4, 1985, *supra* note 19, at 59-60.

23. *A Joint Statement Ends Libel Action By Westmoreland*, N.Y. Times, Feb. 19, 1985, at 1, col. 6 [hereinafter N.Y. Times, Feb. 19, 1985]; L.A. Times, Feb. 20, 1985, *supra* note 15, § I, at 1; NEWSWEEK, Mar. 4, 1985, *supra* note 19, at 59-60.

laration of victory” in the case with America’s retreat from Vietnam.²⁴ Reporters who had covered the case informally polled the jury and found that the jurors were heavily leaning in favor of CBS both on the issue of actual malice and the truth of the broadcast.²⁵

In the final analysis, did CBS benefit from three years of intensive scrutiny of its editorial process? The answer is an unqualified no. The trial created tensions within the CBS hierarchy and temporarily cast a shadow on one of its premier correspondents. The controversy led to a short-lived attempt by Senator Jesse Helms to organize conservatives to purchase CBS stock in an effort to change the editorial outlook of the network.²⁶ Most seriously, the trial led all three broadcast networks to reassess the value of hard-hitting, issue-oriented documentaries in light of the negative publicity and legal ordeal.²⁷ Few politically controversial documentaries have been broadcast on network television since January of 1982. Furthermore, the explosion of libel litigation, of which the *Westmoreland* case was the most widely publicized example, led to a jump in Errors and Omissions insurance rates for media organizations, causing many editors and television producers to steer further away from controversial stories.²⁸

The greatest irony underlying this historic libel case is that the litigation probably could have been prevented in the first place.

II. CBS’ INITIAL FAILURE TO STAND BY THE STORY ENCOURAGED THE *WESTMORELAND* SUIT

A. *The Westmoreland Press Conference*

Several days after *The Uncounted Enemy* aired, General Westmoreland and his supporters held a press conference in which they bitterly criticized the documentary. Among other things, they charged that the broadcast was a “vicious, premeditated attack,” and a “disgrace to

24. Paul Conrad cartoon, L.A. Times, Feb. 19, 1985, § II, at 3; H. Rosenberg, *General vs. CBS: Is There A Winner?*, L.A. Times, Feb. 20, 1985, § VI, at 1 [hereinafter L.A. Times, Feb. 20, 1985].

25. R. Abramson & J. Goldman, *Most on Westmoreland Jury Were Favoring CBS*, L.A. Times, Feb. 20, 1985, § I, at 1, col. 1 [hereinafter L.A. Times, Feb. 20, 1985]; K. Goldman, *Jurors Join ‘Wrap Party’ for CBS-TV Libel Trial*, Daily Variety, Feb. 20, 1985, at 10.

26. S. Smith, *Conservatives Seeking CBS Stock to Change ‘Bias’*, N.Y. Times, Jan. 11, 1985, at 12.

27. L.A. Times, Feb. 20, 1985, *supra* note 15, § I, at 1, col. 1; D. Margolick, *Risks in Litigation*, N.Y. Times, Feb. 19, 1985, at 11, col. 1.

28. L.A. Times, Feb. 20, 1985, *supra* note 15, § I, at 1, col. 1.

American journalism.”²⁹ The General’s response was not unexpected, and CBS cannot be faulted for taking a low-key approach to the mini-controversy spawned by the documentary. No one who worked on the broadcast seriously expected a libel action. In the wake of the Westmoreland news conference, CBS proposed airing a forty-five minute follow-up discussion of the program, with an additional fifteen minutes of free air time for Westmoreland to state his views.³⁰ The general, in response, demanded a published apology, a “full retraction” and a monetary payment. CBS refused.³¹

B. *The TV Guide Article*

Anatomy of a Smear, a *TV Guide* article published in May of 1982, elevated criticism of the documentary to a new level.³² *TV Guide*, the country’s most widely read publication, was not known to take stands on political issues. Employees at CBS speculated that *TV Guide* publisher Walter Annenberg’s friendship with Westmoreland may have prompted the magazine’s foray into hard news journalism.

While the authors of the article disclaimed, “We do not know whether Crile and his colleagues were right about General Westmoreland and his military intelligence operation,” they cited so many editorial biases contained in the documentary that a reader could only conclude that the substance of the documentary was severely and unfairly weighted against the General.³³ For example, the article charged that CIA analyst Sam Adams, a principal witness to the events, was “coached” prior to his interview with Mike Wallace.³⁴ This criticism ignored the reality that Adams was identified as a consultant to the program and that he met regularly with the documentary’s staff to share his ten years of accumulated research and interviews with intelligence types. Nevertheless, the charges contained in the article gave CBS cause to take a new look at the documentary and this is where strategic mistakes from the perspective of libel defense were made.

29. Westmoreland Press Conference Tr., Jan. 26, 1982, Defendant’s Exhibit DX 340, at 1, 2, 4, 17.

30. N.Y. Times, Feb. 19, 1985, *supra* note 23, at 10, col. 2.

31. N.Y. Times, Feb. 24, 1985, *supra* note 16, at 30, col. 1.

32. D. Kowet & S. Bedell, *Anatomy of a Smear*, TV GUIDE, May 29, 1982; Joint Exhibit JX 372.

33. *Id.* at 4, 15.

34. D. Kowet & S. Bedell, *Anatomy of a Smear*, TV GUIDE, May 29, 1982; Joint Exhibit JX 372.

C. *The Benjamin Investigation*

CBS News President Van Gordon Sauter appointed veteran producer Burton Benjamin to conduct a confidential internal inquiry to examine the *TV Guide* charges. Benjamin's investigation took six weeks and culminated in a sixty-page report which concluded that the documentary had violated certain CBS News Guidelines, but there was no proof of a "conspiracy," given the accepted definition of the word.³⁵ Benjamin concluded that, while technical violations such as the double interview of one witness and an edit that combined two separate answers made by a witness into a single statement violated the CBS Guidelines, these editorial decisions "did not distort the meaning of what the interviewees" said.³⁶ Like the *TV Guide* piece, Benjamin purported to focus on journalistic procedure, rather than the substance of the broadcast.

The Benjamin investigation temporarily split the CBS news division into opposing camps: those who supported the documentary, and those who suspected that something must have been wrong with it, or else the news division president would not have commissioned this unprecedented inquiry. The producers of the documentary were concerned that Benjamin could not analyze in six weeks the material that they had assembled over a period of one year, not counting Adams' ten-year research effort.³⁷ Participants in the documentary, Congressional investigators familiar with the intelligence controversy, former White House and Defense Department staffers and Pulitzer Prize winning journalists rallied to the defense of the documentary in personal letters to the CBS president.³⁸

D. *The Sauter Memorandum*

On July 15, 1982, Sauter issued an eight-page memorandum which endorsed the substance of the broadcast, but cited five examples of "violation of the letter or the spirit of CBS News standards in the preparation

35. Benjamin Report, Plaintiff's Exhibit PX 30, at 66.

36. *Id.* at 57; J. Sharbutt, *Producer Claims "Clean Victory" For CBS*, L.A. Times, Feb. 19, 1985, § VI, at 1, col. 1 [hereinafter L.A. Times, Feb. 19, 1985].

37. Crile letter to Sauter, Plaintiff's Exhibit PX 216.

38. Letter from McCloskey to Crile, Feb. 1, 1982, Defendant's Exhibit DX 8; Letter from Powers to Sauter, June 23, 1982, Defendant's Exhibit DX 11; Letter from Rushford to Sauter, June 21, 1982, Defendant's Exhibit DX 12; Letter from Moose to Sauter, June 29, 1982, Defendant's Exhibit DX 278; Letter from Sprey to Sauter, July 2, 1982, Defendant's Exhibit DX 279; Letter from McArthur to Sauter, June 16, 1982, Defendant's Exhibit DX 7; Letter from Hawkins to Sauter, June 21, 1982, Defendant's Exhibit DX 2; Letter from Allen to Sauter, June 29, 1982, Defendant's Exhibit DX 3.

of this broadcast."³⁹ The memorandum also concluded that although "[t]he broadcast presented ample evidence of deception . . . we now believe that a judgmental conclusion of conspiracy was inappropriate."⁴⁰ Thus, while Sauter specifically stated that "CBS News stands by this broadcast," he also gave the press and the public cause to think that the conclusions of the documentary could be flawed.⁴¹

The Westmoreland camp must have viewed the Sauter memorandum with joyous amazement. Not only was the president of CBS News identifying specific technical breaches of its editorial process, but he also appeared to be endorsing the viewpoint that reasonable minds could differ as to the substance of the broadcast, particularly regarding use of the word "conspiracy." On September 13, 1982, Westmoreland's counsel filed a complaint against CBS in federal court in the plaintiff's home state of South Carolina.⁴² In November of 1982, CBS prevailed in its motion to change the venue of the case to the Southern District of New York, perhaps the most significant victory for CBS in the litigation.⁴³ Plaintiff's Complaint alleged that the Sauter memorandum itself contained three statements that libeled Westmoreland.⁴⁴

III. DISCOVERY OF THE BENJAMIN REPORT AIDED WESTMORELAND'S ACTUAL MALICE CLAIM

One of the first items on plaintiff's counsel's agenda was to discover the Benjamin Report. The court granted Westmoreland's motion in April of 1983, agreeing that the document was not privileged and that it shed light on the mindsets of those involved in the preparation of the broadcast and therefore went to the actual malice question.⁴⁵

CBS would have had a stronger legal argument for non-discovery of the document if its internal inquiry had been conducted by an attorney. An investigation conducted either by an outside firm, or by in-house counsel, would have brought the results of the interviews with CBS personnel within the attorney-client privilege doctrine⁴⁶ and, to the extent that the report was prepared in anticipation of litigation, within the work

39. Sauter Memorandum, July 15, 1982, Joint Exhibit JX 372, at 2, 3, 5.

40. *Id.* at 3, 4.

41. *Id.* at 2.

42. Plaintiff's Complaint at 1; N.Y. Times, Feb. 19, 1985, *supra* note 17, at 11, col. 6.

43. N.Y. Times, Feb. 24, 1985, *supra* note 16, at 30, col. 3.

44. Plaintiff's Complaint, Count IV; Plaintiff's Revised Statement of Libels, May 4, 1984, IV at 1-3.

45. N.Y. Times, Feb. 24, 1985, *supra* note 16, at 30, col. 3.

46. CAL. EVID. CODE §§ 952-54 (West 1989).

product doctrine.⁴⁷

The unfortunate result of Judge Leval's ruling is that news organizations have been discouraged from conducting internal inquiries when they learn of alleged flaws in television and print stories. A proper analogy is to those cases involving a manufacturer's internal investigation of a defective product. Defects in products are often cured as a result of internal inquiries. Courts have encouraged such inquiries by preventing their admission into evidence in products liability litigation. Defects in news stories can often be identified and perhaps prospectively remedied by internal inquiries, but discovery of such confidential findings removes the incentive for news organizations to conduct such investigations.⁴⁸ From the perspective of the defendants in the case, the most dangerous aspect of the Benjamin report was that it appeared to identify internal doubt within CBS over the content of the broadcast, when in fact Benjamin's focus was on technical decisions made in organizing the interviews and editing the voluminous film footage, which may have violated the CBS standards.⁴⁹ While Benjamin proceeded with the noble motive of finding out whether there was something seriously wrong with the broadcast, he ended up judging the broadcast against an artificial set of standards and thereby contributed to the rumor mill that the content of the program was flawed. An investigation conducted by an attorney would have focused on the issue of whether there was any evidence of "reckless disregard for the truth" of the allegedly defamatory statements made in the broadcast.

The lesson to be learned from the Benjamin Report and its subsequent discovery is that a media organization, facing a potential libel claim, should not commission an inquiry conducted by a non-attorney who holds the broadcast or article to ideal internal standards. Every news story arises out of a specific set of circumstances. News executives must recognize that some circumstances warrant a news gathering approach that might conflict with predetermined standards.⁵⁰

47. CAL. CIV. PROC. CODE § 2018 (West 1989).

48. L.A. Times, Feb. 20, 1985, *supra* note 15, § I, at 12.

49. Benjamin Report, Plaintiff's Exhibit PX 30, at 57. In fact, no previous CBS news story had ever been scrutinized and judged against the standards in the manner of Benjamin's study of *The Uncounted Enemy*. The News Standards are codified in a manual which is handed out to CBS staffers, but the standards are rarely, if ever, referred to again in the course of a career at the network.

50. One of the procedural violations cited in the Benjamin Report was the double interview of George Allen, Deputy Special Assistant to the Director of the CIA for Vietnamese Affairs from 1966-68. In the second interview, Allen gave a more detailed account of his critique of the Army's intelligence operation, an account that he had verbally confirmed to the program's producers many times. By comparison, print reporters are not held to a standard of

IV. EMPHASIS ON THE TRUTH DEFENSE—THE CBS MOTION FOR SUMMARY JUDGMENT

On May 23, 1984, after twenty months of discovery in the litigation, CBS filed its Memorandum in Support of Defendant CBS' Motion to Dismiss and for Summary Judgment.⁵¹ The "memorandum" was three hundred and seventy-nine pages long, with over one thousand pages of supporting exhibits.⁵² The bulk of the document was devoted to a cogent summary of the enemy strength controversy and the alleged manipulation of intelligence data by the military command in Saigon. The memorandum is exhaustive, brilliant and reads like a historical treatise. It does not resemble a conventional summary judgment motion.

After the controversy generated by Westmoreland's suit, the Sauter memorandum revelations, and the Benjamin Report, CBS discovered that the content of the documentary was strongly supported. Intelligence officers interviewed for the broadcast gave even stronger statements when testifying under oath at deposition.⁵³ Intelligence officers who had provided background-only information to the documentary's producers finally went on the record.⁵⁴ Active military commanders, who had nothing to gain by taking public positions that tended to discredit General Westmoreland and his staff, came forward and offered their testimony.⁵⁵ Prominent figures such as former Congressman Pete McCloskey, author David Halberstam, former Governor George Romney and former Senator Eugene McCarthy presented affidavits confirming personal experiences in which they described various aspects of the intelligence deception carried out by MACV prior to the Tet Offensive.⁵⁶

After unwittingly encouraging Westmoreland to bring his libel suit, CBS News gathered ranks and gave its full support to the legal defense of *The Uncounted Enemy*. The considerable time and resources devoted to this defense are reflected in the Summary Judgment Memorandum. Not

only being able to interview a source for the record on a single occasion. Furthermore, Benjamin never purported to explain how the second Allen interview distorted the content of the broadcast. Benjamin Report, Plaintiff's Exhibit PX 30.

51. CBS Summary Judgment Motion, *supra* note 11.

52. *Id.*, Table of Exhibits, at xx-xxxiv.

53. Hamscher letter to Sauter, June 25, 1982, Defendant's Exhibit DX 10; Allen Letter to Sauter, June 29, 1982, Defendant's Exhibit DX 3, at 1, 3; Hawkins Letter to Sauter, June 21, 1982, Defendant's Exhibit DX 2, at 1; McChristian Aff., Apr. 20, 1984, para. 54; McArthur Letter to Sauter, June 18, 1982, Defendant's Exhibit DX 7.

54. Kovar Aff., para. 12; Shields Aff., para. 15; Daniel Aff., para. 12; Parry Dep. Tr., Jan. 12, 1984, at 103; Gatterdam Aff., para. 21; Stumpf Aff., para. 17; Dickerson Aff., para. 9.

55. Williams Dep. Tr. at 139.

56. Powers Aff., para. 10; McCloskey Aff., para. 13; Halberstam Aff., para. 51, 52; Marcy Aff., para. 19.

surprisingly, after initially taking actions that created an impression that the documentary might have been flawed, the network was eager to prove the accuracy of the story. The integrity of the broadcast had become linked to the integrity of CBS News.⁵⁷

The bold emphasis on the truth defense may have undercut CBS' chances of winning summary judgment on actual malice grounds. CBS correctly contended that in order for Westmoreland, an acknowledged public official during the events described in the broadcast, to prevail, he had to prove with "convincing clarity" that a defamatory "statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."⁵⁸

The Supreme Court has further refined the "actual malice" standard to require plaintiffs to present sufficient evidence to permit the conclusion that the defendant "in fact entertained serious doubts as to the truth of his publication."⁵⁹ The Court has consistently acknowledged that the "actual malice" standard was adopted in order to encourage criticism of the official conduct of public officials and to create a safety zone for publishers to fulfill this task without fear of legal sanction.⁶⁰ The weakest link in Westmoreland's libel suit was his inability to show facts that raised a genuine issue of material fact concerning the essential element of actual malice. Federal courts have made it abundantly clear that summary judgment is appropriate on the issue of actual malice.⁶¹ Westmoreland's lead counsel repeatedly refused to answer interrogatories requiring the General to identify the nature of his claim of actual malice and the basis, if any, for that claim. In statements to the press, Westmoreland's

57. NEWSWEEK, Mar. 4, 1985, *supra* note 19, at 59; L.A. Times, Feb. 19, 1985, *supra* note 36, § VI, at 1, col. 1; L.A. Times, Feb. 20, 1985, *supra* note 24, § VI, at 1.

58. *New York Times*, 376 U.S. at 279-80, 285-86; *accord* *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 342 (1974). Public officials may recover "only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." *Id.*

59. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); "The burden of proving 'actual malice' requires the plaintiff to demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 511 n.30 (1984).

60. "Fear of large verdicts in damages suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to 'steer . . . wider of the unlawful zone,' . . . and thus 'create the danger that the legitimate utterance will be penalized.'" *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) (quoting *New York Times*, 376 U.S. at 279, and *Speiser v. Randall*, 357 U.S. 513, 526, (1958), respectively). Erroneous statements are "inevitable in free debate" and thus "breathing space" is required for "the freedoms of expression" to survive, hence the standard that plaintiff must establish knowing or reckless falsehood. *Bose*, 466 U.S. at 513.

61. *New York Times*, 376 U.S. at 279-80.

counsel claimed that the violations of the CBS internal guidelines during the preparation of the broadcast biased the broadcast against Westmoreland, and that the post-broadcast debate within CBS indicated that the word "conspiracy" was used in the broadcast with knowledge that it was false.⁶² He also told reporters that they would witness the "dismantling of a news organization."⁶³ The constitutional sufficiency of these arguments was extremely questionable, given the failure of Westmoreland to develop evidence that any person responsible for the editorial content of the broadcast believed that the word "conspiracy" falsely described the events depicted in the broadcast. Nevertheless, Judge Leval ruled against CBS' summary judgment motion on both the truth and actual malice arguments.⁶⁴

While it is always dangerous to speculate on the rationale for a judge's decision, two major factors probably weighed against granting CBS' summary judgment motion. First, the sheer length of CBS' 200 page truth defense must have suggested to Judge Leval that the plaintiff had raised issues of material fact as to the truth of the broadcast. Second, the actual malice charge was introduced in the context of CBS' internal criticism of the broadcast and post-broadcast debate among CBS executives over use of the word "conspiracy." The greatest paradox of the exhaustive defense rendered by counsel for CBS was that the comprehensive truth defense argument may have undercut the network's chances of prevailing on summary judgment. However, the extensive truth defense preparation gave CBS the upper hand when the case went to the jury.

V. THE SETTLEMENT OF THE CASE: WHAT DID CBS GAIN AND LOSE?

After eighteen weeks of testimony and just days before Judge Leval was expected to turn the case over to the jury, General Westmoreland decided to withdraw his lawsuit against CBS. The settlement agreement did not involve an apology or payment by CBS.⁶⁵

The settlement statement was innocuous: "[B]oth General Westmoreland and CBS believe that their respective positions have been effectively placed before the public for its consideration and that continuing

62. CBS Summary Judgment Motion, *supra* note 11, at 297-98.

63. Daily Variety, Feb. 19, 1985, *supra* note 18, at 1, col. 5.

64. Westmoreland v. CBS Inc., 596 F. Supp. 1170, 1178 (1984).

65. R. Abramson, *Westmoreland to Drop Libel Suit Against CBS*, L.A. Times, Feb. 18, 1985, § I, at 1; N.Y. Times, Feb. 19, 1985, *supra* note 23, at 1, col. 6.

the legal process at this stage would serve no further purpose."⁶⁶ However, if the General's intention in bringing the litigation was only to place his position before the public, perhaps he would have been better served by accepting CBS' proposed offer of free air time made in February of 1982. If one takes the language of the settlement statement at face value, pleading \$120 million in damages to Westmoreland's reputation was a requirement imposed by the General's attorneys and not a genuine goal of the libel suit. What Westmoreland had really sought all along, according to his post-settlement rationalization, was simply restoration of his honor.⁶⁷

A key passage of the settlement statement was as follows: "CBS respects General Westmoreland's long and faithful service to his country and never intended to assert, and does not believe, that General Westmoreland was unpatriotic or disloyal in performing his duties as he saw them."⁶⁸ At a press conference after the settlement, Westmoreland declared that "[i]f that statement had been made after the CBS program was aired, it would have satisfied me."⁶⁹ Westmoreland also admitted that he was "shocked" at the testimony of his former intelligence chief, General Joseph A. McChristian, who testified that Westmoreland had blocked intelligence reports in May of 1967 that indicated higher enemy troop strength and subsequently suppressed those figures for "political consideration."⁷⁰

The CBS camp also claimed victory. David Boies, the lead CBS counsel at Cravath, Swaine & Moore, told reporters that "when a plaintiff wants to drop a lawsuit . . . without demanding money or an apology, I think you ought to let him."⁷¹ Van Gordon Sauter, who had been elevated from news president to executive vice president of the CBS Broadcast Group, observed that "the greatest revelation" to come out of the trial testimony was "what CBS had to say during this program was vindicated."⁷²

Yet if CBS was confident of victory, both on malice and truth, why did it agree to settle the case at the end of the long and costly trial?

66. *Texts of Statements on the End of Westmoreland's Libel Suit Against CBS*, N.Y. Times, Feb. 19, 1985, at 10, col. 2 [hereinafter N.Y. Times, Feb. 19, 1985].

67. NEWSWEEK, Mar. 4, 1985, *supra* note 19, at 59-60; L.A. Times, Feb. 20, 1985, *supra* note 24, § VI, at 1.

68. N.Y. Times, Feb. 19, 1985, *supra* note 66, at 10, col. 2.

69. N.Y. Times, Feb. 24, 1985, *supra* note 16, at 30, col. 1.

70. Daily Variety, Feb. 19, 1985, *supra* note 18, at 1, col. 5.

71. N.Y. Times, Feb. 24, 1985, *supra* note 15, § E, at 20; NEWSWEEK, Mar. 4, 1985, *supra* note 19, at 59-60.

72. Daily Variety, Feb. 19, 1985, *supra* note 18, at 21, col. 5.

Although the informal polling of the jury established that the jurors were leaning almost unanimously in favor of a truth verdict for CBS,⁷³ this outcome could not be guaranteed. In the wake of the *Sharon v. Time Inc.*⁷⁴ litigation that had just concluded in the same courthouse, the network was concerned that a victory on malice grounds alone would be a Pyrrhic victory at best. *Time* magazine's reputation for objectivity and accurate reporting had been tarnished by its loss on the truth issue in the libel suit brought by the former Israeli Defense Minister.⁷⁵ An unidentified CBS attorney told the *New York Times*:

If Westmoreland was ready to drop the suit on the right terms, it was in some ways better than winning a jury verdict . . . Westmoreland could always attack a verdict that went against him. This, he couldn't. Besides, CBS simply had to respond to his offer—it couldn't be seen as trying to pursue an old man and drive a stake in his heart.⁷⁶

One benefit of a settlement to CBS was that even a favorable jury verdict could have led to an appeal by Westmoreland. Judge Leval had ruled that plaintiff would have to establish malice by the "clear and convincing" evidence standard, rather than the "preponderance" of the evidence standard sought by the General. Westmoreland's attorneys might also have focused on evidentiary rulings made in the case as grounds for appeal. While the Second Circuit has consistently supported media defendants in libel actions, CBS was well aware that the growing conservative majority on the Supreme Court did not bode well for the network. Attorneys for CBS speculated that this was not the best media test case to provide the newly-appointed Reagan Supreme Court Justices with an opportunity to rethink and perhaps revise the malice standards in *New York Times* and *Gertz*.⁷⁷

Those of us who worked on the documentary were slightly bewildered by the settlement. We thought we were winning on truth and that the integrity of the documentary would finally be vindicated by the jury. We were gratified that the various intelligence officers who had served as sources for the broadcast had come through, at the risk of personal approbation from colleagues in the military, with testimony that solidly supported the thesis that Westmoreland's intelligence command had deceived the Congress and the President by adhering to the artificially

73. L.A. Times, Feb. 20, 1985, *supra* note 25, § I, at 1, col. 1.

74. No. 83-4660 (S.D.N.Y. Jan. 31, 1985).

75. N.Y. Times, Feb. 24, 1985, *supra* note 16, at 30, col. 2.

76. *Id.*

77. *See infra* note 58.

low estimate of enemy troop strength, when the enemy was in fact gathering its forces for the greatest offensive of the war. We did not understand why the network, after suffering the slings and arrows of press criticism, and after staking the reputation of the news organization in this costly litigation, would settle the case when it was on the verge of victory.

While the conclusion of the *Westmoreland* litigation was confused and muddled,⁷⁸ media organizations can benefit from reviewing the case to determine how to defend challenged broadcasts and news articles and how to take steps to reduce the likelihood that controversial stories become the subject matter for celebrated libel cases.

78. L.A. Times, Feb. 20, 1985, *supra* note 24, § VI, at 1.

