After General Westmoreland's trial: the verdict on libel law

by Edward Spannaus

Until a few years ago, it was virtually impossible for a public official or prominent public figure to bring a libel case to trial in the United States. Under the prevailing doctrine of *New York Times v. Sullivan*, a public figure had the burden of showing "actual malice"—nothing to do with real malice, but defined as publishing a "knowing falsity" or acting "in reckless disregard of the truth." Most cases were summarily dismissed before trial. In effect, the press was above the law, possessing the right to defame or lie about a public figure—so long as the victim could not prove, with "clear and convincing evidence," that the reporter either knowingly lied or acted in reckless disregard of the truth.

This unchallenged reign of the media was threatened in 1979 in a famous footnote in which the U.S. Supreme Court suggested that no longer should libel cases brought by public figures be dismissed at the summary-judgment motion stage before going to trial. Since 1979, a number of prominent figures have been able to get their cases to trial, and have been awarded large money judgments by juries, only to have awards reduced by trial or appellate court.

Over the past six months, three major libel suits by public figures against pillars of the "Eastern Establishment media," NBC, CBS, and *Time* magazine, have gone to trial, giving rise to an unprecedented amount of publicity and public attention on libel law. The overwhelming volume of press coverage was given to two of these cases—the Sharon and Westmoreland trials—while the third, that of Lyndon H. LaRouche against NBC, received little press coverage outside this news service and the *Washington Post*. But ultimately, the LaRouche case may be the most important in bringing the media to task: In this case, the errors and deficiencies of current libel law were most glaring.

The question of truth

The striking difference between the Sharon and Westmoreland cases on the one hand, and the LaRouche case on the other, was that in the first two, the trial centered on the search for the truth; whereas in the latter, the trial from the outset centered on the so-called state of mind of the reporters and what they knew or claimed not to know, not on the truth or falsity of the statements broadcast.

The process is best illustrated in the Sharon case. There, the jurors decided the statements by *Time* against Sharon were false and defamatory, by stating or implying that Sharon encouraged massacres in Palestinian refugee camps. Morally, Sharon claimed victory. The jury ruled in favor of *Time*, however, finding that it had not acted with reckless disregard of the truth.

In *Westmoreland*, the general conceded and settled when he—and his financial backers—became convinced that the testimony at trial was so damaging that the jury would find that CBS had told the truth when it said that Westmoreland had participated in a conspiracy to understate enemy troop strength in Vietnam.

In neither case did the full truth come out. In fact, Sharon probably was guilty of what *Time* reported. In fact, it was not Westmoreland but his underlings—such as Lt. Gen. Danny Graham—who falsified enemy figures to the level politically acceptable to President Johnson. But, in contrast to the LaRouche case, in *Sharon* and *Westmoreland* the issue of truth was fought out in an adversary proceeding. In the LaRouche case, truth was barred at the courtroom door.

This was accomplished in *LaRouche v. NBC* through a number of legal ruses, the most important of them rulings by Federal Judge James C. Cacheris of the Eastern District of Virginia which gave full credence to the arguments of defense counsel that the issue was not the truth or falsity of the alleged libelous statements, but, rather, whether the reporters in question *knew* the statements were false or had serious doubts about their veracity. Thus, Cacheris excluded whole areas of testimony and evidence—such as background on NBC's and the Anti-Defamation League's key sources, or evidence in the public domain of LaRouche's actual political views—on the grounds that these were irrelevant unless it could be proven that NBC were aware of such matters prior to the broadcasts in question.

Most egregious was Cacheris's "Caspar the Ghost" ruling on confidential sources. The jury was instructed that NBC could rely on so-called confidential sources as support for its statements, without having to name the sources or present any collateral evidence which would back up charges made by these unnamed sources. In consequence, the trial revolved around the issue of what the reporters said they *believed*, rather than the truth or falsity of statements about LaRouche. As the outcome of the Sharon trial showed, this is a secondary issue and should be so treated, even though the technical outcome of the trial may ultimately depend on this. Sharon's jury found he had been defamed, but it could not be proven

that *Time knew* the statements were false, or had acted in reckless disregard of the truth. But first, the matter of truth had to be resolved.

NBC's $3 million 'mega-verdict' knocked out

A bizarre byproduct of Judge Cacheris's rulings, "barring truth at the courtroom door," was the $3 million judgment awarded by the runaway jury to NBC for alleged "interference in business relations" by Lyndon LaRouche.

On Feb. 20, Cacheris reduced NBC's "mega-verdict" to $200,000, knocking out $2.8 million of the $3 million damages judgment as "excessive." But in so doing, Cacheris predictably upheld the jury's verdict, despite the complete lack of evidence sufficient to support the jury's finding.

After LaRouche sued NBC and the ADL one year ago, NBC subsequently filed a counterclaim, charging LaRouche with interfering in NBC business relationships by way of an alleged call made by a LaRouche supporter canceling an interview of Sen. Daniel Moynihan to be conducted by NBC reporter Pat Lynch. (The counterclaim also charged LaRouche with a racketeering violation—a charge later dismissed by the court.) The counterclaim was filed for harassing value, and should have been thrown out of court.

The striking difference between the Sharon and Westmoreland cases on the one hand, and the LaRouche case on the other, was that in the first two, the trial centered on the search for truth; whereas in the latter, the trial centered on the so-called state of mind of the reporters.

However, during the trial the jury became so contaminated and inflamed—by unsubstantiated hearsay from "confidential sources," and lying *Washington Post* reports of "threats" to NBC reporters—that one juror was excused because she expressed fear of a sketch artist associated with LaRouche! Repeated motions by LaRouche attorneys for a mistrial were denied by Cacheris.

Under these conditions, it was a foregone conclusion the jury would find against LaRouche on the libel claim. After 13 hours' deliberation, the jury awarded NBC $2,000 in actual damages and $3 million in punitive damages. This was a cause for concern even to pro-media libel lawyers, who have been climbing the walls about "mega-verdicts" awarded by juries to libel plaintiffs; this was the first time such a judgment was awarded to a libel defendant.

LaRouche's post-trial motions sought to have the counterclaim verdict set aside or reduced, on the grounds that: 1) The verdict was unsupported by the evidence presented at trial. 2) The verdict was the product of "passion and prejudice" on the part of the jury. And 3), the damages were excessive beyond any known standard—a ratio of $3 million punitive damges to $2,000 compensatory (actual) damages was beyond any known precedent.

In libel cases, "hearsay" evidence is permitted for a limited purpose: demonstrating the state of mind of a reporter, insofar as the reporter claims he or she relied on certain statements and believed them to be true—*ergo*, no "reckless disregard of the truth." In *LaRouche*, this was carried to ludicrous lengths by Cacheris. When the jury deliberated on the counterclaims, it clearly relied on evidence that was perhaps admissible as hearsay on the libel case, but had no probative value with regard to the counterclaims, like videotapes of Lynch's interview with Senator Moynihan.

Ruling on the post-trial motions, Cacheris held there was other evidence—not hearsay—to justify the verdict. He cited the fact that since LaRouche had said he was "investigating" NBC and its reporters, his testimony "proved that he interfered with NBC's business relationships."

To justify the award of punitive damages, Cacheris argued that "the jurors heard many examples of similar harassing tactics employed against reporters who were attempting to do stories about LaRouche." The "examples" cited by Cacheris included incidents which never happened, and, of course, which never were proved in court except by outrageous hearsay. One such "example": Supporters of LaRouche picketed Pat Lynch outside NBC's New York office! In most courtrooms, picketing is protected by the First Amendment to the U.S. Constitution. In Judge Cacheris's courtroom, it will subject the demonstrator to liability for heavy damages for "harassment."

Cacheris also adopted the arguments of NBC counsel—wholly unsubstantiated by evidence—to justify the award of $200,000 damages, "the maximum sum for punitive damages the law would accept in this trial." "LaRouche's lavish lifestyle discussed at trial shows that he lives like a millionaire," wrote Cacheris. The only person who discussed LaRouche's "lavish lifestyle" was NBC lawyer Thomas Kavaler; there was no testimony or other admissible evidence to this effect.

"LaRouche also testified that his presidential campaign was spending a great deal of money on television advertisements, paying as much as $250,000 for a single program." This is supposed to be further evidence of LaRouche's ability to pay. But of all people, a federal judge ought to know that the collection and spending of election campaign funds is strictly regulated by federal law—such funds cannot be used either to support a "lavish lifestyle" or to pay a court judgment.

Interview: Michael F. Dennis

How LaRouche's trial was different

EIR *interviewed Michael F. Dennis, an experienced libel lawyer who was a trial attorney representing Lyndon H. LaRouche in the case* LaRouche v. NBC and ADL.

EIR: What is the significance of the outcome of the Sharon and Westmoreland trials?
Dennis: In the Westmoreland and Sharon trials, the courts were interested primarily in determining the truth of the allegation, unlike the court in LaRouche, which tried to determine whether NBC had a right to rely on its sources, whether true or false. The criteria used in the Westmoreland and Sharon cases were correct: that first and foremost, the important thing is whether the statements made were true or false. Then, once that was established, did they have a right to rely on the sources they used?

EIR: How was the LaRouche case different?
Dennis: Truth was totally obscured in our case. All kinds of prejudicial garbage was allowed in that shouldn't have been allowed in. Since so much hearsay was allowed in, we made an offer of proof regarding Gordon Novel, for example [principal source used by NBC to charge that LaRouche plotted the assassination of President Carter and members of his cabinet].

We made an offer of proof regarding Novel. We should have been allowed to put before the jury the truth about Novel. That offer of proof was designed to show that Novel was totally beyond belief. . . . That offer contained court documents that showed Novel had been involved in many presidential assassination plots, including involvement in the Kennedy assassination. If put before the jury, we would have shown that this man deals in fabricated assassination plots, and that NBC knew or should have known that this man was a liar. . . .

We elicited an admission from Pat Lynch that Gordon Novel was a convicted felon, but the court would not allow us to go into the background. . . . The court allowed all kinds of hearsay to stand, including Novel's TV statements. LaRouche had a number of witnesses, who were present. . . . They gave the total lie to Novel's story. NBC didn't present any witnesses, yet the jury believed Gordon Novel, because we were prevented from presenting the truth.

In the Westmoreland and Sharon cases, and in other libel cases I have been personally involved in in New York, the courts have permitted the plaintiff, particularly a public figure, sufficient pre-trial discovery. This is essential in order to meet the extreme burden of proof which a public figure has to meet, to show reckless disregard of the truth. In this jurisdiction [the Eastern District of Virginia, in Alexandria] we were permitted only five non-party witnesses—although we managed to get six—out of a total of 187 possible witnesses [which NBC had claimed to have interviewed about LaRouche]. . . . The other rule in that district is that a case must go to trial within six months. We had witnesses all over the U.S. and Europe. . . .

EIR: Did the issue of confidential sources figure in the Sharon and Westmoreland trials?
Dennis: Confidential sources were not an issue in the Westmoreland case. In the Sharon case, they were, and Judge Sofaer was very good on this. *Time* claimed that the proof lay in confidential Israeli government documents. But because the Israeli government wouldn't disclose them, they claimed to be at a terrible disadvantage. Judge Sofaer wrote to the Israeli government, and was informed that there was no such statement in the Kahan Commission report that would support reporter David Halevy's allegations about Sharon encouraging the massacre. Under Judge Sofaer, *Time* could not say they relied on a confidential source, whereas in the LaRouche case, the court allowed NBC and the ADL complete freedom to rely on confidential sources—on people who were nameless, faceless, who couldn't be cross-examined, who wouldn't testify at trial.

The court allowed NBC to have it both ways: They could broadcast statements, relying on sources without names, and yet cite these nameless, faceless sources as proof of the truth. In New York, you can't have it both ways; you can't rely on confidential sources unless you name them. If you won't name them, then you can't prove your case by them, you have to prove it through other means. . . .

The LaRouche trial was essentially and substantially different. In *Westmoreland*, there were no confidential sources, but the general got two years of discovery before trial. In *Sharon*, there were two years of discovery, and no limitation on non-party sources. By implication, the court said: "You can't rely on confidential sources; that's not good enough."

EIR: What do you think the outcome of this round of cases will be?
Dennis: The outcome will be mixed. First, the costs were substantial. Secondly, defendants like NBC and CBS have the wherewithal to withstand trials like this. Thirdly, plaintiffs don't. Westmoreland ran out of money. This will tend to limit libel suits by public figures.

These cases, especially the Sharon case, establish that the media has to be a lot more careful. But for the finding of the jury, that *Time* did not act with reckless disregard, Sharon would have won.