

Libel Suit Raises Questions on Press Confidentiality

By DEIRDRE CARMODY

An order by a Federal judge in a libel suit that CBS turn over to him a producer's notes about a CBS documentary has raised new questions about the confidentiality of the editorial process.

The libel suit has been brought by Anthony B. Herbert, a much-decorated lieutenant colonel who resigned from the Army in 1972 after being relieved of his command in Vietnam following his accusations that fellow officers had covered up war crimes and atrocities committed by American troops there.

In 1973, Mr. Herbert was the subject of a CBS "60 Minutes" program. He then filed suit against CBS, Mike Wallace and Barry Lando, the producers, and the Atlantic Monthly, which subsequently published an article by Mr. Lando about the making of the "60 Minutes" program.

The suit alleges that both the program and the article maliciously portrayed Mr. Herbert as a liar who had committed atrocities and acts of brutality in Vietnam and as an opportunist seeking to use the war crimes issue to cover up his own alleged failures in the Army.

'Public Figure' Status

The suit is of particular interest to the press because Colonel Herbert is considered a "public figure," which means that he has to go to greater lengths to prove he has been libeled than would a more obscure person. To prove damages, a "public figure" must show not only that the statements made about him is false but also that they were known to be false by those who made them (or in this case, who produced the show) or made with "reckless disregard" of their truth or falsity.

To prove the awareness of truth or falsity that existed in the minds of the defendants at the time, Colonel Herbert has asked them to produce a number of documents, including notes and film footage, relating to the CBS show or the Atlantic article. The suit is still in the pre-trial period, but there have already been more than 40 hours of deposition-taking, the transcripts of which cover more than 4,000 pages.

The defendants turned over many of the documents that were requested but balked at answering certain questions. Mr. Herbert now seeks an order compelling answers to these questions, which involve the conclusions of Mr. Lando during his research about leads to be pursued or not to be pursued, his conclusions about facts given to him by people he interviewed and what he

thought about their veracity, conversations between Mr. Lando and Mr. Wallace about what should be included or excluded from broadcast publication and various other conversations with sources.

Judge Charles S. Haight 3d of the Southern District of New York has now ruled that the defendants must turn over these documents for examination by him in his chambers. He said that he would issue a further ruling on the documents after he had seen them.

First Amendment Cited

What troubles the press lawyers who are watching this closely is that they have traditionally held that the First Amendment guarantees of free expression protect the editorial process, which begins when the decision is made to do a show or write an article and continues until the final product appears.

The press lawyers say that these notes, conversations and particularly, opinions, are all part of a decision-making process that cannot be interfered with by anyone, particularly government. The decision of what to include in a story, for instance, is an inherent part of this process and should not be subject to scrutiny by any outsiders, they argue.

But the question remains: How does a plaintiff like Mr. Herbert prove bad intentions by the producers or authors—as he is required to do because he is a public figure—without having access to this kind of material?

"This case indicates precisely the risk of a libel law which permits recovery based upon bad intentions," says Floyd Abrams, a lawyer who has been involved with many of the major First Amendment cases in recent years. "It certainly indicates the grave risks inherent in the imposition of the legal system onto the journalistic process."

Mr. Abrams pointed out the irony in the fact that the court decisions defining a public figure and imposing a heavy burden of proof on him before he can claim libel have traditionally been con-

sidered pro-press decisions because they make it that much harder for a public person to sue for libel. However, in ordering CBS and the other defendants to produce documents and notes to show what was in their minds the judge has in effect taken an aspect of these pro-press decisions and turned them against the press.

The National News Council, which monitors the activities of the press, issued a statement about Judge Haight's opinion, calling the issues posed "of major portent for the press, the law and the public at large."

"The decision carries pre-trial discovery into new ground—that of permitting inquiry into subjective aspects of the defendants state of mind," the statement said.

The judge has categorized the case as "one of first impression," signifying a judgment on an issue not previously decided in the courts.