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Media gets license to lie—for now

by Sanford Roberts

Last month's Supreme Court decision in the case of *Philadelphia Newspapers v. Hepps* provoked a justifiably outraged reaction from many persons who believe that the courts have become too deferential to the rights and privileges of this nation's news media. In the Hepps case, the Court ruled that private figures in defamation suits must shoulder the burden of proving the falsity of allegations made against them. This burden of proof has been shouldered by public figures, i.e., public officials or persons who have otherwise attained prominence in public affairs, since the 1964 landmark Supreme Court ruling in *New York Times v. Sullivan*.

The importance of the burden of proof in defamation cases can be seen in the factual circumstances of the Hepps case itself. In Hepps, the principal stockholder of a chain of stores and the corporation itself sued the *Philadelphia Inquirer* for alleging connections between Mr. Hepps, his corporation, and certain figures allegedly tied to organized crime. The chief sources of these allegations were federal agents whom the *Inquirer* refused to identify under the Pennsylvania shield law, a law which allows journalists to "shield" their sources from public disclosure and makes a libel plaintiff's ability to prove falsity an exercise in futility.

Under the common law, once a plaintiff demonstrated that a statement was legally defamatory, the burden of proof shifted to the defendant to prove the truth of his or her allegations. This common-law principle governed the American law of libel until the *New York Times v. Sullivan* decision just two decades ago. In that case, the Court decided that libel suits were encroaching on protected First Amendment interests and shifted the burden to the plaintiff to prove falsity. Further, the *New York Times* Court ruled the plaintiff must also prove something called "actual malice," that is the journalist knew the contested allegation was false or acted with reckless disregard for the truth, a standard of proof which virtually wiped out successful public-figure libel suits.

While the moral outrage provoked by the Hepps case is understandable and appropriate, it is also short-sighted. The Hepps ruling, when viewed in tandem with other recent Supreme Court decisions in the libel area, demonstrates that the present Court is badly divided on questions of libel law and there is a growing coalition among the Justices to overturn or substantially modify the precedent set in *New York Times v. Sullivan*.

The Hepps case produced a dissenting opinion signed by four Justices which characterized the majority view as a "blueprint for character assassination." The dissent, authored by Associate Justice John Paul Stevens, notes the extraordinary burden which Mr. Hepps, a private figure plaintiff, must carry when the media defendant shields his sources. The crux of the newspaper's allegations against Hepps were based on a supposed relationship between Hepps, his corporation, and a third party. Stevens wrote, "[t]he truth or falsity of that statement depends on the character and conduct of that third party—a matter which the jury may well have resolved against the plaintiffs on the ground that they could not disprove the allegation on which they bore the burden of proof."

The dissent emphatically asserts that private figure plaintiffs should not have to prove falsity to recover damages in defamation cases. In a more subtle way, the opinion also contends that public figure plaintiffs should not have to prove falsity either. In a footnote tucked away near the end of the opinion, Stevens claims, "[i]f the issue were properly before us, I would be inclined to the view that public figures should not bear the burden of disproving the veracity of accusations made against them with 'actual malice' as the *New York Times* Court used that term."

If the Hepps dissenters want an opportunity to overturn or modify the *New York Times* doctrine, they have an immediate chance before them. Attorneys for Democratic presidential candidate, Lyndon H. LaRouche, Jr., are preparing a petition to the Supreme Court to review Mr. LaRouche's libel suit against the National Broadcasting Company. In the early part of 1984, NBC broadcast two defamatory programs accusing Mr. LaRouche of plotting to assassinate President Carter and other criminal acts. NBC principally relied upon sources which it refused to disclose during the course of the trial.

The trial court judge, James Cacheris, refused LaRouche motions to disclose the sources or preclude this evidence from being presented. Based upon the tainted and prejudicial evidence submitted, the jury ruled that none of the allegations were proven false by convincing clarity. This verdict was rendered despite the fact that NBC had not offered one piece of competent evidence to support their truth defense. They didn't have to, since under *New York Times*, the entire burden was on the plaintiff.

The Hepps dissenters may find support for a case involving confidential sources from the majority side. Associate Justice Sandra Day O'Connor's majority opinion specifically held that the issue of confidential sources, the heart of the LaRouche appeal, was not appropriately before the Court in Hepps and is left open for another day. If the Supreme Court accepts the LaRouche petition, the case will be orally argued next autumn.

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