

Resource Center demonstrate that a generally positive litigation year was skewed very significantly by a single huge adverse verdict.

Although the number of media libel, privacy, and related trials in 1997 was the highest level since 1993, the media prevailed in them at an all-time high rate of 50 percent. The damages awarded last year rose to the highest level in the history of the Center's survey, based primarily on the unprecedented libel jury trial award of \$222.7 million in the U.S. District Court for the Southern District of Texas in *MMAR Group Inc. v. Dow Jones & Co.* (The \$200 million punitive damages award against Dow Jones was subsequently overturned and the entire case is on appeal.)

The 1997 average jury award was ten times the average award of 1996; however, the median award was slightly less than the previous year. The average 1997 compensatory damage award for jury trials was more than double the average 1996 jury award; the median award for 1997 was the same as the 1996 median. The average punitive damages award last year was nearly ten times the prior year's average.

In terms of success rate, in 1997 media defendants won three-quarters of federal court cases and 44.4 percent of state court cases. Defendants won 55.6 percent of the 1997 trials in which plaintiffs were public figures, and 50 percent of the cases in which they were not. In those cases where the actual malice standard applied, defendants were more successful by a one-case margin. Overall, the defense success rate is at its highest point in the LDRC's 18-year study of trials and damages, as half of all trials in 1997 were won by the media.

Part II

Legal Update for Editors

A continuing review of legal developments significant to magazine editors.

By Lawrence Savell

In Part I (*Editors Only* for April, 1998), we reviewed electronic rights, and began a discussion of libel which continues herein.

Libel

Where the plaintiff is a "public figure" or public official, the plaintiff must prove a higher degree of "fault" on the part of the media, known as "actual malice." Many libel cases focus on the determination of whether a particular person is or is not a "public figure." In *Jee v. The New York Post Co.*, a New York State court judge

ruled this year that a school principal who was in charge of her school on a daily basis was a public official for purposes of a libel suit against a newspaper. Because the plaintiff failed to meet her burden of showing that the allegedly libelous statements in the articles involved were made with actual malice, the court dismissed the complaint. As this court noted, courts in some other states have similarly found school principals to be public officials.

Statistics on 1997 media libel, privacy, and related trials released this year by the Libel Defense

If the MMAR case is excluded, the 1997 average damages award is at an all-time low for the 18-year LDRC study; even including

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MMAR, the median total damages award for 1997 is among the lowest of the 1990s. Moreover, only two awards in 1997 exceeded \$1,000,000, a smaller number of such verdicts than any other period in the 1990s. In addition, the dollar level of punitive damage awards, which had risen troublingly in 1996, apart from MMAR, has significantly lowered.

A note to publishers whose publications are distributed internationally: U.S. courts may refuse to enforce in this country, libel judgments based on laws that fly in the face of our First Amendment. In *Telnikoff v. Matusevitch*, the Maryland Court of Appeals refused to enforce a British libel judgment on the grounds that England's excessively plaintiff-friendly defamation law is "repugnant" to U.S. law. Bear in mind, however, that any company with assets in England or in any European Union country may be vulnerable to having those assets seized in those locations to satisfy a judgment.

Privacy

There are four traditional categories of invasion of privacy: (1) appropriation of name or likeness; (2) public disclosure of private or embarrassing facts; (3) "false light"; and (4) intrusion. However, not all states recognize all of these variants; different

states may define them in various ways.

For example, in *Doe v. Methodist Hospital*, the Indiana Supreme Court ruled that an action for public disclosure of private facts was not recognized in that state. The Court affirmed a lower court's granting a defendant coworker's motion for summary judgment in plaintiff's public disclosure of private facts action, based on the coworker's disclosure that the plaintiff was HIV-positive. The Court explained: "Over the last century, courts and commentators have developed a quadripartite formulation for the tort of invasion of privacy. In this case we consider whether one branch of that tort, public disclosure of private facts, may form the basis of a civil action in Indiana. On the facts of this case, we decline to recognize that it may."

Obscenity

The United States Supreme Court denied certiorari and therefore let stand the Second Circuit Court of Appeals decision in *General Media Communications Inc. v. Cohen*, that the Military Honor and Decency Act of 1996, which bans sale or rental of sexually explicit materials at military exchanges, does not violate the First or Fifth Amendments. The Second Circuit had ruled "that Congress acted well within its constitutional authority to regulate official military conduct." It explained that "Congress has not banned sexually explicit magazines and videos — soldiers and sailors may still buy them elsewhere, receive them by mail, and read or watch them; Congress has decided only that the military itself will not be in the business of selling or renting these items to service members." The Court

rejected the claims that the free speech rights of publishers and producers of sexually explicit materials would be abridged if the military stopped selling and renting their products. "[M]ilitary exchanges are not public street corners; they are not available for everyone to "speak" from their shelves. These stores are nonpublic forums in which the government may restrict the content of speech, so long as the restriction is reasonable and it does not discriminate among particular viewpoints."

"Aiding and Abetting"

The United States Supreme Court denied certiorari and thus let stand the significant Fourth Circuit decision in the "Hit Man" case, *Rice v. Paladin Enterprises, Inc.*, dealing with whether a publisher can be held responsible for "aiding and abetting" a crime based on information it provides to readers. The Fourth Circuit decision had reversed a lower court's granting of summary judgment to

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the publisher, and sent the case back down for trial. The appellate court focused on the specific guidance the book allegedly provided to a reader (and subsequent murderer), the court referring to "instructions" and "seductive adjurations" which "readied" and "steered" the killer, going so far as to state in its written opinion that the court "even felt it necessary to omit portions of these few

illustrative passages in order to minimize the danger to the public from their repetition herein."

The notion that a publication can be held responsible for the actions of others who read its content and choose to act upon it is obviously of concern to many publishers, including those whose publications describe dangerous or hazardous activities or products. It may also be of concern to publishers who run advertisements in their periodicals for potentially illegal activities (such as "escort services"). The ruling may quite possibly have a chilling effect on publishers whose works depict

criminal activities, regardless of whether they are works of fiction and regardless of their literary merit (although the courts found this particular book had none). Countless works from the Bible onward could fall within the broad scope of publications that contain descriptions — often graphic and specific — of illegal acts.

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