

## Celebrity Privacy ? Trials About Videotapes

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**PRACTICES** Media and Entertainment Litigation

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Early 2016 was eventful for observers of media-related trials. In Florida, Terry Bollea (whose wrestling name is Hulk Hogan) obtained a massive \$140 million verdict against Gawker Media and its CEO for the publication of a portion of what Bollea testified was an illegally made adult tape. And in Tennessee, Erin Andrews, an ESPN sports commentator, won a \$55 million verdict against the operator of a Nashville hotel and the man that illegally videotaped her in her hotel room. Although the cases have significant differences, both trials are tremendously interesting and have at least one lesson in common.

### The Hogan Trial

Terry Bollea, who wrestled under the name Hulk Hogan, is a professional wrestling star whose racist comments got him fired from the WWE not long ago. Bollea has been wrestling as the Hogan character since at least the 1980s. Bollea claimed that Gawker Media and its CEO, Nick Denton, crossed the line when Gawker published a portion of a secretly-recorded tape depicting Bollea having sex with his best friend's wife. At trial, Gawker argued that as a public figure Bollea could not use, manipulate, and take advantage of the media on a systematic basis for decades to advance his career and then complain when the media reported news about him. Gawker further pointed out that there is a First Amendment right to comment on public figures. Finally, Gawker asserted that Bollea had boasted of his sexual prowess in the media in the past, making the sex tape relevant. Lurking in the background of the case were Gawker's allegations that Bollea had filed the lawsuit to squelch release of a *second* sex tape of him that showed him using a racial slur, and that Bollea was focused on the potential adverse publicity related to the slur rather than the depiction of him having sex in either tape. Further, both tapes had apparently been leaked by Bollea's former best friend, Bubba "the Love Sponge" Clem; Gawker alleged that Clem knew of Bollea's real motive to stop release of the two tapes (to avoid bad publicity related to the racial slur). Clem exercised his Fifth Amendment right against self-incrimination and refused to testify in deposition or trial. Gawker claimed that Clem's testimony would have supported its theories of the case.

Setting aside the murky facts and allegations, the key to the Bollea victory in the trial was his testimony and his lawyer's argument that even celebrities deserve privacy in the bedroom. On the stand, Bollea admitted making statements about sexual prowess in the past, but claimed he was in character as Hulk Hogan when he did it. He stated that although he cultivated a public image of a braggadocious wrestler, he tries to shield aspects of his life from public view. His lawyer argued at closing that talking on radio shows and elsewhere about matters related to sexual prowess "does not open the door to putting a camera in a bedroom and putting that on the Internet." Deliberating for about four hours, the Florida jury found for Bollea on March 18, 2016, awarding him \$115 million – \$55 million for economic injuries and \$60 million for emotional injuries. Three days later, the jury awarded punitive damages of \$25.1 million, including \$10 million against Gawker CEO Denton. Obviously, Gawker is appealing.

### The Andrews Trial

Erin Andrews, an ESPN sports commentator and NFL sideline reporter, sued the operator of a Nashville Marriott, West End Hotel Partners LLC (“**West End**”), and the peeping Tom who illegally videotaped her in her room, Michael David Barrett. Ms. Andrews was also stalked in two other locations by Mr. Barrett, who went to prison for stalking her. Andrews’ claim against West End was that its hotel employees had given Barrett her room number and allowed him to rent the room connected to hers. Barrett reversed the peephole to Andrews’ door, used the adjoining room to hear when she was showering, and secretly videotaped her while she was naked. Barrett posted the four-and-a-half minute illegal video on the Internet, where it quickly went viral and reportedly continues to be available to this day, despite Andrews’ efforts to eliminate it.

Andrews testified emotionally at trial that her life had been devastated by the invasion of privacy by Mr. Barrett, as well as the fallout from publication of the tape. She said she was “embarrassed, humiliated, and mortified” by the video. She explained in detail how her personal routines had changed and persuasively testified about the personal emotional injuries she had suffered. On cross-examination, counsel for West End suggested Andrews’ career had been helped and her income increased by the publicity surrounding the video, pointing out Andrews’ endorsements – for Reebok, for Degree deodorant, for Diet Mountain Dew and others – and a commercial for Victoria’s Secret.

This defense strategy apparently backfired. The jury found for Andrews, returning a \$55 million verdict on March 7, 2016. The jury divided the responsibility for paying the award – Barrett must pay just over \$28 million, and West End \$27 million. The case has settled since the verdict; terms were not disclosed.

### The Common Theme

Although there are significant differences between the two cases, the two have something in common. First, in both cases, a key theme of the defense was that the public figure involved had no right to complain because he or she had benefitted from media publicity, and therefore should not be heard to complain. In Bollea’s case, this argument was explicit and the publicity had preceded the injurious event – Gawker’s attorney argued that because Bollea, as the flamboyant Hogan character, had taken advantage of publicity and even commented on issues related to sex, that he could not then complain about publication of the sex tape and commentary about it. In Andrews’ case, West End’s attorney was more subtle – he implied that Andrews’ career had been enhanced, not hindered, by the publication of the illegal videotape of her. Second, the key theme was supported, entirely or in part, by the facts – Bollea did not dispute that he had talked about sex in the media before; Andrews did not dispute, on cross-examination, that she had signed multiple endorsement deals since the illegal taping and its publication. In Andrews’ case, however, it is unclear how much, if any, of her success was attributable to publicity surrounding the publication. But finally, and most importantly, neither jury bought these arguments. Both juries rejected the theory that public figures are “fair game” for egregious invasions of privacy, as well as the theory that public figures should not be heard to complain if they may have “benefitted” financially from invasions of privacy or media publicity generally. Importantly, particularly in the Bollea case, the jury simply did not believe that a public figure was “fair game” for commentary about what went on in the privacy of a bedroom, regardless of what that public figure might have said before. In Andrews’ case, the defense argument that Andrews had no, or lesser, damages because of her successful career post-event was a dangerous one, and it is no surprise the jury found it unpersuasive, if not offensive.

It is likely that the Hogan case will change significantly on appeal – that the appellate court will rule that the First Amendment allows Gawker to publish portions of the sex tape and comment on it. And there are other potential problems with the evidence excluded in the Hogan case. In any event, the fact remains that jurors do not believe the media has carte blanche to say and publish what it wants about public figures; nor did the jurors buy the argument, implicit at the Andrews trial, that there is “no such thing as bad publicity.”