

RESTAURANT & HOSPITALITY ALERT

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The Erin Andrews \$55,000,000 verdict: Can it happen to your property?



If you own or manage a hotel or inn, the Erin Andrews \$55,000,000 verdict probably caught your attention. You wonder, “could that happen to my hotel?” Yes it can. Is it likely? That depends on your hotel’s actions and your procedures. Let’s look at the facts of the case and the law to understand how the verdict came to be.

In 2009, Erin Andrews was staying in the Nashville Marriott Hotel. Michael David Barrett had been stalking Ms. Andrews at the time. By claiming that he was part of Andrews’ “team,” he managed to convince the hotel staff to reveal that Andrews was staying at the hotel. He then used a hotel house phone to learn which room she was in and used this information to request a hotel room next to Andrews. One fact which has not been widely reported is that Andrews’ room was allegedly on a “secure floor” – a designation which likely has varying meanings to property owners and guests. Barrett was able to use his immediate proximity to tamper with the peep hole on Andrews door at an ideal time – allowing him to see from the outside in. A disturbing reality is that anyone can do this with a readily available \$60 device. Barrett then videoed Andrews nude in her room without being detected by the hotel staff. He later posted the video on the Internet, which subsequently went viral. Andrews was mortified

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and suffered emotional trauma from the event, which she testified that she continues to suffer even now. She also testified that she is still harassed daily in tweets and emails, a fact that was apparently very persuasive to the jury.



The jury later found that not only was Barrett liable for his actions and the resulting emotional trauma for Andrews, but the owner and the operator were liable as well.

Andrews sued Barrett, Marriott International, West End Hotel Partners (the property owner), and Windsor Capital Group (the hotel operator). The state court dismissed the claims against Marriott International since it was a franchisor and it neither owned nor operated the hotel. The jury later found that not only was Barrett liable for his actions and the resulting emotional trauma for Andrews, but the owner and the operator were liable as well. But why would they be liable for the actions of a “Peeping Tom?”

As you likely recognize, hotels owe a duty to their guests to “exercise ordinary or reasonable care” to keep them safe. The hotel will be liable for injuries to guests caused by third persons if the hotel could have, with reasonable care, (1) discovered that such acts were being done or were about to be done and (2) protected the hotel guest by controlling the conduct of the third person or giving warning to the guest to avoid the harm.

Looking at that rule, it may be hard to see how these facts would result in finding the hotel defendants liable. Being tricked by someone to disclose a guest’s presence is not necessarily a violation of “exercise of ordinary or reasonable care,” peepholes can be reversed with an easily available device, and there is no obligation to constantly monitor all hallways. The key here is “reasonable care,” a phrase that can be open to interpretation and debate – at least that is what the judge determined when he allowed the jury decide. When you have an injured party who happens to be a beautiful celebrity, a jury can become sympathetic. Add that she is still being impacted by the incident today and becomes very emotional in front of the jury – the juror’s heartstrings are pulled. An interesting point to

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also consider is how the jury responded to the claims of the defendants' lawyers that Andrews was not harmed and that her career actually benefited as she continued to do well. In hindsight, it probably was not a good strategy to claim she was not actually harmed financially. Indeed, we know what the jury thought of that! While there will surely be appeals, a multi-million dollar judgment can be devastating to many hotels and management companies.

So, what steps can you take to prevent something like this from happening to your property? Start by having a very direct conversation with your staff about your security measures. Assess what efforts you have in place and if those efforts should be enhanced. Ask yourself these questions:

- Now that you know that reverse peephole devices exist, what will you do to defeat them?
- You know that famous people are often the targets of zealous stalkers; so, if you host celebrity guests, how can you protect their identities?
- You also know that ex-spouses and estranged spouses can be stalkers. How do you protect your guests from them?
- Is your security guard actually patrolling the property regularly? Is he/she properly trained to detect unusual activity?
- Do you ask guests if they want to shield their presence from anyone who inquires, other than specifically named persons?
- If you have onsite security, are they actually patrolling regularly and are they properly trained?
- Do you have a written waiver of liability that the guest signs or acknowledges?
- If you are the owner, do you have an indemnification from the operator for its negligent acts?
- Does your insurance cover incidents like Ms. Andrews'?
- If you do have a problem, does your insurance policy allow you to select counsel you deem the best for you or are you obligated to use counsel that the insurance company selects?

You may say "No, I don't do all those things, and I should not have to." You might argue that the measure of liability of the hotel should depend on the scale of the potential harm, as well as the cost of the security efforts and probability and foreseeability of the potential harm. However, keep

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in mind that if you have an “Erin Andrews Incident,” your actions will be based on the 20/20 hindsight of a judge or jury and on experts testifying against you to help the guest recover. So, make sure that your guests’ safety is (or remains) high on your priority list. Protect your guests just as you would want another hotelier to protect members of your family. Take steps that will allow a future jury to see that you protected your guest to the best of your ability. And if you failed, allow a future jury to see that you showed compassion and concern for the guest’s experience.

Finally, you may ask: do the laws differ from state-to-state on this – for example, does Ohio law protect hoteliers more than the Tennessee law did? The answer is yes – Ohio does limit punitive (financial) damages, whereas Tennessee law (in effect in 2009 – the time of the incident) did not. As a general rule, Ohio law limits punitive damages to two times the amount of compensatory damages. While that may save you from a \$55,000,000 judgment, the damages could still be significant depending on the victim’s financial harm, medical bills and any other damages – and the damage to your hotel’s reputation could be shattering.

If you have not done a recent security audit or legal review or if you have not checked your insurance policy’s coverage, you should do so. Check your policy coverage requirements regarding counsel – can you hire an attorney of your choice (covered by the insurance policy). A few hours of property, policy and contract review now potentially could save you millions later.

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