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After The Haze: Legal Aspects of Hazing

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ABSTRACT:

Hazing continues to be legally problematic for institutions. In June 2007, a New Jersey prosecutor brought criminal charges against two administrators over the alcohol-related death of a freshman. It is not uncommon for administrators to be charged civilly in hazing cases, but this is believed to be the first time college administrators have been charged criminally in a hazing incident. Although the case against the administrators was dropped, the charges indicate that administrators may run the risk of being charged in both civil and criminal courts. It is therefore important for institutional administrators to have an understanding of hazing, its laws and its effects on their institutions. Institutions looking to be proactive by creating programs to diminish hazing may be held to a higher legal duty of care. This conundrum clouds the hazing problem further for administrators. In this article, possible legal issues and implications for institutions will be explored through a review of literature and case law.

KEYWORDS:

Institutional Liability, Hazing, Tort Law

INTRODUCTION

In June 2007, a New Jersey prosecutor brought criminal charges against two administrators over the alcohol-related death of a freshman (Toutant, 2007). It is not uncommon for administrators to be charged civilly in hazing cases, but this is believed to be the first time college administrators have been charged criminally in a hazing incident. Under New Jersey law, hazing is “a disorderly person’s offense”. However, if hazing results in serious bodily injury, then the person is guilty of aggravated hazing, which is a crime in the fourth degree. The statute further explains that a person is guilty of hazing if he or she "knowingly or recklessly organizes, promotes, facilitates or engages in any conduct, other than competitive athletic events, which places or may place another person in danger of bodily injury". A person is guilty of aggravated hazing if he or she commits such an act and the result is a serious bodily injury to another person (Title 2C, §§ 40-3 to 40-4). 1

This article explores the issue of institutional liability while also providing a broad overview of hazing as it has been addressed at the college and university level within the United States. After a brief introduction, the definitional morass that characterizes hazing is addressed, as are the cultural issues surrounding the practice. These sections are followed by an overview of the legal aspects of hazing as found in anit-hazing statutes and regulations as well as hazing as it is treated in criminal law, civil law, civil anti-hazing statutes, constitutional law and federal statutes and tort law. The article ends with a discussion regarding the conundrum administrators face in their attempts to prevent hazing and reduce liability. 2

Studies (Hoover, 1999; McGlone, 2005) have shown that hazing is still more prevalent than many administrators would like to acknowledge. This dissonant behavior has led to the growth in hazing laws over the past 16 years. The number of states with anti-hazing statutes grew from 25 in 1990 to 44 in 2006. However, the legal fallout from the act of hazing, which emerges out of perceived superiority within groups and feasts upon the alleged weaknesses of the rookie group members, could become a tangled web for athletes, coaches, athletic departments and their respective institutions. 3

DEFINING ‘HAZING’

‘Hazing’ is a broad term that encompasses many activities, situations and actions that an individual must tolerate in order to become part of the group or team. When trying to construct a definition of hazing, one must consider many different viewpoints. The definition and meaning of hazing often varies from one person to another. For example, an individual who is performing an act of hazing may define the term very differently from the person being hazed. An administrator may perceive hazing and the various acts involved differently to a coach or parent. Furthermore, some individuals may only consider physical bodily acts as hazing, while others may include emotional and sexual acts as hazing activities. The definitions of hazing become a central focus when administrators are obliged to decide if hazing occurred or if the activity was a case of horseplay gone wrong. While hazing has been acknowledged for centuries, there is no universally accepted definition. This may be due to the many forms and the variety of ways in which initiations and rituals take place within different organizations. 4

In 1993, Olmert defined hazing as “a formal introduction into some position or club . . . which signifies that the beginner has been given some new knowledge” (p. 150). This definition can easily apply to hazing within the athletic milieu. For example, a rookie player who has been introduced to the secret world of the team playbook or strategies that the team may use illustrates the formal introduction to a position through the ascertaining of knowledge. Thus, while a majority of people would not classify this as hazing, by Olmert’s definition this ritual based on obtaining new knowledge would be so regarded. Definitions like Olmert’s may be too limited to establish effective policy regarding hazing. 5

In 1999, an alternative definition of hazing was postulated by Hoover: “any activity expected of someone joining a group that humiliates, degrades, abuses, or endangers, regardless of the person’s willingness to participate.” Hoover’s definition thus challenges one of the common myths associated with hazing, namely that if a person participates in an initiation ceremony voluntarily, the initiation process cannot be considered “hazing.” Hoover’s definition proposes that an activity that humiliates, degrades, abuses or endangers another is an act of hazing regardless of the individual’s willingness to participate. Several state laws dispute this proposition, including Texan law which states “it is not a defense to prosecution for the offense under this subchapter that the person against whom the hazing was directed consented to or acquiesced in the hazing activity” (Sec. 4.54). Moreover, these definitions provide a more detailed explanation of what hazing entails, making it easier for policy makers and athletic directors to effectively illustrate what activities may be considered as hazing. 6

New York’s judicial system uses the following definition: 7

(1)The striking, laying hands upon, treating with violence, or offering to do bodily harm with the intent to punish or injure or other treatment of a tyrannical, abusive, shameful, insulting or humiliating nature; (2) The subjecting of a freshman or fraternity pledge to treatment intended to put one in a ridiculous or disconcerting position (3) the intimidation of a person by physical punishment; (4) a word which incorporates treatment from the wearing of a “beanie cap” to permanent disfigurement of the body; and . . . (5) any act or series of acts which cause or are likely to cause, bodily danger or physical harm, or mistreatment by planning stunts or practice abusive or ridiculous tricks that subject an individual to personal indignity or ridicule. (253 N.Y. S 2d 9, 1964)

While the above definition of hazing details mostly physical acts that may cause bodily harm, the statutes in many states include activities that involve mental hazing or may lead to emotional disturbances. The following hazing policy was passed by the Texas state legislature (Sec. 4.51) addressing offenses related to hazing at or in connection with an educational institution. 8

“Hazing” means any intentional knowing, or reckless act, occurring on or off the campus of an educational institution, by one person alone or acting with others, directed against a student that endangers the mental or physical health or safety of a student for the purpose of pledging, being initiated into, affiliating with, holding office in, or maintaining membership in any organization whose members are students at an educational institution. The term includes but is not limited to: 9

1. any type of physical brutality, such as whipping, beating, striking, branding, electronic shocking, placing of a harmful substance on the body, or similar activity;
2. any type of physical activity, such as sleep deprivation, exposure to the elements, confinement in a small space, calisthenics, or other activity that subjects the student to an unreasonable risk or harm or that adversely affects the mental or physical health or safety of the student;
3. any activity involving consumption of a food, liquid, alcoholic beverage, liquor, drug, or other substance which subjects the student to an unreasonable risk of harm or which adversely effects the mental or physical health or safety of the student;
4. any activity that intimidates or threatens the student with ostracism that subjects the student to extreme mental stress, shame, or humiliation, or that adversely effects the student from entering or remaining registered in an educational institution, or that may reasonably be expected to cause a student to leave the organization or the institution rather than submit to acts described in this subsection;
5. any activity that induces, causes, or requires the student to perform a duty or task which involves a violation of the Penal Code. Sec. 4.52.

The various definitions mean that college administrators and others may have great difficulty determining what constitutes hazing, as well as what types of behaviors may be so regarded. Furthermore, it can be difficult to develop legislation that encompasses all aspects of hazing without compromising constitutional rights. The ambiguity in hazing laws, combined with the continuance of hazing activities, has created the call from many anti-hazing activists for the establishment of national anti-hazing legislation. This legislation may create consistency in determining the legal threshold for hazing, as well as the penalty for hazing. 10

TYPES OF HAZING

Researchers have classified hazing into various categories including, but not limited to, sexual-related acts, acts of humiliation, acts of violence and alcohol-related acts (Hoover, 1999; McGlone, 2005). These categories can be combined into two distinctive clusters of physical and mental. The physical form of hazing may include beating, branding, paddling, excessive exercise, drinking and using drugs. Coerced sexual activities including sexual assaults are considered forms of physical hazing. Reported incidents of sexual hazing have included simulated sex acts, sodomy and forced kissing. 11

Psychological or mental hazing often goes overlooked or undetected but can be no less dangerous than physical hazing. Psychological hazing occurs when an initiate feels they are in a dangerous situation or that there is a high degree of embarrassment involved with the activity. In addition, activities that are designed to intimidate, embarrass or harass would be considered types of psychological hazing (Ellsworth, 2004). Types of psychological hazing may include verbal abuse, being subjected to highly stressful situations, being asked to perform acts that go against personal beliefs such as committing a crime, and/or being subjected to a perceived physical danger. Another form of psychological hazing includes simulating sexual activities. Psychological and physical hazing can occur separately or in conjunction with one another based upon the activities and the perspective of the person being hazed. 12

HAZING AS A TRADITION

Tradition plays a role in hazing activities. As time has passed, these traditions have continued and evolved. While many groups like fraternities, athletic teams and band organizations try to keep traditions alive, they use the culture of one-upmanship to add on to the traditions of the past in order to leave their personal mark on the group. It is this add-on effect that makes hazing more dangerous today. By adding a new element to hazing, older members get to add a new twist and expand on the tradition. For example, when a first-year athlete joined the team they were required to drink a beer in order to become part of the team. The following year, the new athletes were required to drink a six pack of beer in order to become part of the team. As years pass, the six-pack becomes a gallon until the tradition becomes a “drink until you pass out” rite of passage. The add-on effect has made hazing more dangerous and some activities may be life threatening. For example, one athlete was hazed during his freshman year by being kidnapped and left in the woods, several miles from the university, wearing only his running shorts and being told to make his way back to the field. When this freshman was an upperclassman and was planning the hazing, he subjected the rookies to the same kidnapping episode; however, prior to this the rookies were forced to drink a fifth of whisky and were stripped down to their underwear. One of the athletes had to be treated for alcohol poisoning and frostbite. 13

Furthermore, hazing is typically planned and carried out behind closed doors or in secret. The silence is sometimes broken after someone has been injured so severely that medical attention is required. At this point, the secret is revealed and the activities become public. The school or organization, as well as athletes, may be put under the media microscope and the effects of the hazing activity may be intensified by the amount of attention being given to the incident. This attention may cause great difficulty for the image of the school, its athletic programs, the coaches and the athletes, and thus becomes a public relations issue for the entire institution. 14

In a landmark study conducted by Alfred University, researchers found that hazing was more prevalent than the general population believed. The findings of the study revealed that nearly 45% of students knew about, had heard of, or suspected hazing on their campus. The findings also revealed that 80% of the students surveyed had been subjected to various hazing activities (Hoover, 1999). These resulted were supported by a follow-up study that focused entirely on hazing in women’s NCAA Division I (DI) athletics which found that nearly 50% of current female DI athletes had been hazed during their college experience (McGlone, 2005). These studies reveal what many already know; hazing is occurring and these acts are putting students, administrators, coaches and institutions at risk. 15

Hazing is often thought of as a rite of passage. Many people are more than happy to share their experiences with whomever will listen when the perception of the risk has faded. However, acts of hazing often come at a high price. Games and seasons get cancelled (Gardiner, 2001), property may get vandalized and people may be injured. Worse, lives may be lost; hazing can end in personal tragedy and institutional upheaval. For example, in the spring of 2007, a freshman pledge at Rider University was participating in an on-campus pledge party. The pledges at the party were required to drink large amounts of liquor as is often the case during initiation ceremonies. The freshman pledge was pronounced dead after the party and was found to have had a blood alcohol level of 0.426 (Newsmaker, 2007). While there are countless similar tales regarding hazing, this one is particularly noteworthy as the administrators were initially charged with aggravated hazing. This appears to be the first time administrators have faced criminal charges as a result of hazing on college campuses; many have faced a myriad of legal issues stemming from hazing on their campuses. The charges against the university administrators were eventually dropped but a suit against the University for wrongful death has been filed. 16

INTERCOLLEGIATE HAZING- A BRIEF HISTORY

As college men went off to World War II, the number of hazing incidents drastically dropped. Following the war, many veterans attending universities would not tolerate being hazed by "kids" (Nuwer, 1990). These same vets introduced violent physical hazing to fraternities that gave the rituals a "boot-camp" feel. As fraternity memberships experienced a large growth in the late 1940s, reported incidents of hazing also boomed. 17

In 1988, at Kent State University, five freshman hockey players were taken off campus by seven teammates. The freshman had their heads shaved into Mohawks and then were forced to drink a mixture of rum and beer (Dellisse, 1993). Two of the team members were charged with providing alcohol to a minor, the other five were charged with hazing violations and the hockey program was suspended for a period of one year by the president of the university. 18

In 1990, a University of Northern Colorado freshman baseball player was paralyzed from the chest down after sliding into a pool of mud headfirst. The 18-year old freshman sustained two broken bones in his neck and a bruised spinal cord. The incident occurred after a cancelled practice due to wet weather conditions. The older team members told the freshman players to report to the field, stand in line and sing "take me out to the ballgame, strip down to their underwear, and then take turns sliding into a mud pool. Just prior to the incident, the team's coaches and senior members attended a meeting with a university official who had heard rumors that hazing was being planned" (Monaghan, 1990, A42). Following this meeting the head coach called a separate meeting condemning such activities and informing the players of possible penalties. After the hazing incident, athletic department officials suspended a student-assistant coach whom they believed knew of the hazing and did not attempt to stop it. 19

The University of Minnesota-Morris wrestling team used scare tactics in a hazing ritual in 1993 when they staged a mock KKK rally. The event was an attempt to scare African American teammates. The initiates were taken to an off-campus site where they were met by their teammates who were wearing white pillowcases over their heads pretending to be white supremacists. One of the initiates fled the scene and called 911 for help (Prank, 1993). 20

One of the most cited hazing incidents involved the 1999-2000 hockey team at the University of Vermont. That team had its season cancelled after a hazing incident involving nine freshmen players who had suffered extreme treatment during hazing activities (Duffy, 2000). A former walk-on goalie and eight other freshmen players attended a team party in which they were coerced into lying on a basement floor while being spat upon and having beer poured over them. They were forced to engage in a "pie-eating contest" in which the pie was seafood quiche doctored with ketchup and barbeque sauce with a community bucket into which several of them vomited nearby. They performed push-ups while naked as their genitals dipped into warm beer beneath them. The number of push-ups performed determined whether they would drink their own glass of beer of someone else's. In the wake of the scandal the university implemented a policy that required athletes to sign a contract agreeing to report incidents of hazing. The University of Vermont *Student-Athlete Handbook 2007-2008* also describes the potential sanctions an athlete may be subject to for violating the hazing policy which may "…w ithout limitation include loss of athletics eligibility and/or scholarship" (p. 30). In addition, team captains received leadership instruction to help them intervene in situations that could be dangerous. 21

LEGAL ASPECTS

Educational institutions at all levels often do not place much emphasis on preventing hazing due to the fact that most state and federal laws do not require them to do so (Edleman, 2005). Many state laws identify hazing from the perspective of the student, but fail to address the role of the institution itself in the prevention of hazing. For example, North Carolina law states: 22

It is unlawful for any student in attendance at any university, college, or school in this state to engage in hazing, or to aid or abet any other student in the commission of this offense. For the purpose of this section, hazing is defined as follows: "to subject another student to physical injury as part of an initiation, or as a prerequisite to membership, into any organized school group, including any society, athletic team, fraternity or sorority, or other similar group". Any violation of this section shall constitute a Class 2 misdemeanor (N.C. Gen. Stat. Â§ 14-35 (2007)).

In fact, there is only one federal statute that deals directly with hazing. This decree was contained in an 1874 military statute. Otherwise, federal law currently overlooks the issue of hazing altogether (Edleman, 2005). However, as previously mentioned, federal anti-hazing law has been proposed. Considering that hazing activity is not likely to be stopped overnight, as it is highly embedded in the culture of many university student organizations, it is vital that administrators understand the potential areas of liability student hazing may bring to the institution. In addition, students who fall victim to acts of hazing have several options when seeking recourse. Many suits have been filed on the victim's behalf consisting of both federal and state claims. Some of the federal claims have typically been filed under the umbrella of violations of the 4th and 14th amendments, citing due process violations. Other federal claims have been 23

filed under a violation of Title IX.

A Matter of Law

Anti-hazing Statutes

As the number of reported hazing incidents has increased so has the number of states that have passed legislation to deter hazing from occurring. Currently there are 44 states with anti-hazing statutes while six states have not developed or introduced anti-hazing laws (Nuwer, 2004). 24

Current hazing legislation varies from state to state, and the punishments for hazing may include a fine, imprisonment or both depending on the state and the severity of the hazing incident. 25

In the states that have anti-hazing statutes, the laws are often imperfect. Often the states developed these statutes as a reactionary measure following a tragic hazing act that received attention. This reactionary response often leads to statutes that are not fully developed. 26

Furthermore, hazing is often not well-defined or is constricted in terms of scope. For example, Michigan law states: 27

(b) “Hazing” means an intentional, knowing, or reckless act by a person acting alone or acting with others that is directed against an individual and that the person knew or should have known endangers the physical health or safety of the individual, and that is done for the purpose of pledging, being initiated into, affiliating with, participating in, holding office in, or maintaining membership in any organization. Subject to subsection (5), hazing includes any of the following that is done for such a purpose: (i) Physical brutality, such as whipping, beating, striking, branding, electronic shocking, placing of a harmful substance on the body, or similar activity. (ii) Physical activity, such as sleep deprivation, exposure to the elements, confinement in a small space, or calisthenics, which subjects the other person to an unreasonable risk of harm or that adversely, affects the physical health or safety of the individual. (iii) Activity involving consumption of a food, liquid, alcoholic beverage, liquor, drug, or other substance that subjects the individual to an unreasonable risk of harm or that adversely affects the physical health or safety of the individual. (iv) Activity that induces, causes, or requires an individual to perform a duty or task that involves the commission of a crime or an act of hazing (750.411t).

As mentioned previously, many of the anti-hazing statutes fail to recognize that hazing activities can result not only in physical harm, but also lead to emotional and mental harm. Many cases of athletic hazing have resulted in athletes experiencing symptoms like “depression, feelings of guilt, anxiety, and hopelessness” (Graber, 2000; McGlone, 2005). The athletes who experience these symptoms following a hazing incident have little recourse when seeking relief under these statutes. Other definitions, like one from Louisiana, fail to recognize that hazing may take place on athletic teams and address only fraternal organizations (La. Rev.Stat. Ann. 17:1801). Another way these statutes are limited includes only dealing with institutions of higher education (Pa. Stat. Ann. Tit 24, 5352) (Crow & Rosner, 2002; Edleman, 2005). In fact, only 27 states have laws that apply to high school hazing (Edleman, 2005). In addition, these statutes may ultimately fail to protect the safety of the athletes because there is no universal definition of hazing nor is there consistency of punishment for those that haze. Due to the ambiguity, students may not be deterred from hazing. In fact, based on media reports it could be said that these anti-hazing statues are ineffective because hazing offenses appear to be on the rise at all levels of athletics (Ferrey, 2000). It remains unclear whether more precise definitions would deter hazing as no research has been done to illustrate the effectiveness of hazing law after definitions have been changed. It is possible that if hazing were prosecuted under different laws that carry heavier penalties (such as kidnapping, sexual assault and battery laws), it would send a message to organizations that these acts are taken seriously and this in turn may reduce hazing. However, there is no research to support this assertion at this time. 28

As history has revealed, education and hazing have a strong link. While research shows hazing is more prevalent than society is comfortable acknowledging, educational institutions and their respective boards have a responsibility to operate in a manner that is conducive to the educational mission. This responsibility includes providing a safe environment. 29

Hazing & Criminal Law

In many states, hazing is considered a misdemeanor usually carrying a fine of $10-$10,000 and jail sentences between 10 days and 1 year. In 6 states (Illinois, Idaho, Missouri, Texas, Virginia, Wisconsin) hazing that results in death or “great bodily harm” is categorized as a felony (Anti-Hazing Statutes, 2002). Interestingly, most of the states that carry criminal laws regarding hazing do not require teachers, coaches or administrators to proactively try to prevent hazing. However, in Alabama, Arkansas, Massachusetts, New Hampshire, South Carolina and Texas, the state imposes a duty on school personnel to report hazing (Edleman, 2005). In fact, the Alabama statute states “(c) No person shall knowingly permit, encourage, aid, or assist any person in committing the offense of **hazing,** or willfully acquiesce in the commission of such offense, or fail to report promptly his knowledge or any reasonable information 30

within his knowledge of the presence and practice of **hazing**in this state to the chief executive officer of the appropriate school, college, university, or other educational institution in this state. Any act of omission or commission shall be deemed **hazing**under the provisions of this section (§ 16-1-23)".

Hazing & Civil Law

Plaintiffs who pursue civil action for hazing offenses may do so under the auspices of civil anti-hazing statutes, constitutional law and tort law. The heads of claim under which remedy has been sought include *in loco parentis*, negligence, assault and battery, harassment, vicarious liability and premise liability. 31

Civil Anti-Hazing Statutes

One of the major issues regarding hazing is the fact that how hazing is addressed from a legal standpoint varies from state to state. Several states offer specific terms for what relief may be sought after hazing has transpired. For example in Ohio the law states, "Any person who is subjected to hazing…may…sue for injury or damages, including mental and physical pain and suffering, that result from the hazing ((Ohio rev. Code Ann. 2307.44 2005; Edleman, 2005). This law is novel because it allows suits to be filed against administrators, employees and faculty who could or should have been aware of the possibility of hazing but failed to take action to stop its occurrence. 32

Constitutional Law & Federal Statues

Case reviews show that Constitutional violations are one of the more dubious approaches in hazing litigation. These cases have had limited success and victims typically initiate the litigation citing the due process clauses of the 4th and 14th amendments. In *Hilton v. Lincoln Way High School* [1998] No.97-C-3872, a hazing ritual took place in which the new band members were kidnapped and taken to the woods where they were forced to participate in a "Ku Klux Klan" type of ceremony. Hilton asserted that the hazing ritual violated her 4th amendment right because of an illegal seizure (kidnapping). The court heard that there was a history of unconstitutional conduct that school officials contributed to, and thus ruled in the favor of Hilton (Crow & Rosner, 2002). In *Nice v. Centennial Area School District*, Nice brought suit claiming his 14th amendment rights had been violated during a hazing incident where he was held down by a teammate during an initiation process. The hazing act that occurred in this case involved a tenth grade wrestler who was victimized by a number of different kinds of hazing activities. One incident of hazing was called "ass breath" by the students. It is a ritual whereby the victim would be held down and another student would sit with his bare buttocks on the victim's face (Levin. 1999). This claim was settled out of court by the school district. Furthermore, under 42 U.S.C. 1983, public institutions can be held liable for monetary damages and injunctive relief (Crow & Rosner, 2002). 33

Using the standards set forth under 42 U.S.C. 1983, the victims of hazing have sought relief stating that the hazing violated one of their federal rights. In *DeShaney v. Winnebago* [1982] 489 US 189, the U.S. Supreme Court reasoned that a student's right to bodily integrity is a constitutionally protected interest. In order to prevail in this type of claim, the plaintiff must prove that the defendant acted with deliberate indifference in regards to the student's individual constitutional rights by failing to prevent harm when it had previous knowledge of harmful situations occurring. The 2007 case involving 2 members of Kappa Alpha Psi Fraternity of Florda A & M University hinged on the definition of serious bodily harm. This was the first case in Florida to utilize the newly-enacted Chad Meredith Act, named after the University of Miami student who died in 2001 as a result of hazing. The act makes distinctions between misdemeanor and felony hazing charges based on bodily harm. The initial trial resulted in a mistrial due to jurors not being able to agree on what serious bodily harm meant. The case was heard again and the defendants received a jail sentence of 2 years for the hazing incident. In the hazing case *Alton v. Texas A & M University* [1999] No.98--40338, Alton claimed to have been beaten repeatedly as part of a hazing ritual. He filed suit against the attackers, who were also students, and the officials and faculty advisor, claiming his rights had been violated. The court addressed this issue in the case of the non-student officials who had tried to take action to stop the hazing incidents. "In sum, the officials' conduct must be measured against the standard of deliberate indifference." Therefore Alton had to establish the following to be successful in his claim: 34

(1) the officials learned of facts or a pattern of inappropriate hazing behavior by a subordinate pointing plainly toward the conclusion that the subordinate was abusing the student; (2) the officials demonstrated deliberate indifference toward the constitutional rights of Alton by failing to take action that was obviously necessary to prevent or stop the abuse; and (3) the officials' failure caused a constitutional injury to Alton.

Alton was not able to successfully prove that the officials acted with deliberate indifference and the court granted the defendant officials qualified immunity. 35

Tort Law

Under tort law, the hazing victim must prove that wrongdoing occurred on the part of the defendant who caused some type of damage and/or injury. Intentional tort clams are cited frequently in hazing litigation. Several cases have included tort claims of negligent infliction of emotional distress, intentional inflection of 36

of emotional distress, assault and battery, negligence, and vicarious and premise liability. For example, in *Brueckner v. Norwich* [1999] No. 730 A.2d 1086, a 24 year old R.O.T.C. student filed suit against the university after being enrolled for only 16 days as a consequence of several incidents of hazing. A lower court found the institution liable for assault and battery, negligent infliction of emotional distress, intentional infliction of emotional distress, and negligent supervision. The hazing episodes were committed by upperclassman R.O.T.C members who were charged by Norwich with the responsibility to "indoctrinate and orient "rooks" through various activities. The university trained these cadets on how to fulfill this role. The various acts of hazing committed by the upperclassmen included verbal and physical harassment, so much so that the plaintiff felt threatened in terms of both his physical and mental wellbeing which he contended interfered with his academic studies. The acts also resulted in Brueckner being denied the opportunity to eat, as well as a shoulder injury requiring medical attention. Brueckner reported the hazing to University officials prior to leaving the institution. Records indicate that the University had been aware of persistent hazing problems involving the R.O.T.C program; however they did not take any action to alter the training programs offered on campus and left the upperclassmen "virtually unsupervised". The jury awarded the plaintiff both compensatory and punitive damages based on the theory that the university had made the decision to remain ignorant of the hazing activities.

The Supreme Court of Vermont upheld the lower court's ruling, utilizing respondeat superior and stating that the university was vicariously liable for the actions of the students because they were acting within the scope of their employment. The scope of respondeat superior specifies that an employer may be held accountable for the torts of an employee during the span of the employment (see *Anderson v. Toombs*, 119 Vt. 40, 44-45,117 A. 2d 250,253 (1955); because the students' tuition tees were paid in return for enrollment in the military program and subsequent military service, they were considered government employees by virtue of their association with the R.O.T.C program. Therefore, the hazing activities were within the scope of employment and the institution was liable for the tortuous acts of the cadre both because the institution had authorized the indoctrination and orientation, and because the institution was negligent in meeting a duty of reasonable care to control and supervise the cadre. 37

The issue of negligence is often reviewed in hazing cases and is typically the principal way plaintiffs bring suit. The issue at hand in most negligence claims is whether the defendant owed the plaintiff a duty. *Knoll v. Board of Regents* [1999] 601 N.E.2d 757 establishes that "the threshold inquiry in any negligence action is whether the defendant owed a plaintiff a duty" (p. 757). Following from that, "actionable negligence cannot exist if there is no legal duty to protect the plaintiff from injury." The court utilized the risk-utility test which considered the following factors (1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk, (4) the opportunity and ability to exercise care, (5) the foreseeability of harm and (6) the policy interest in the proposed solution. As the court noted, reasonable minds may disagree as to the duty owed a student by a university in circumstances where hazing occurs off campus. However, it further concluded"the University owes a landowner-invitee duty to students to take reasonable steps to protect against foreseeable acts of hazing, including student abduction on the University's property, and the harm that naturally flows therefrom" (Knoll, 1999). 38

Many college administrators believe that they cannot be liable for what happens outside of school hours or off campus because the students are of legal age. However, some courts have been willing to hold schools accountable in hazing cases on the basis that the university had a responsibility to protect students from foreseeable injuries, including those resulting from acts of hazing. In *Morrison v. Kappa Alpha Psi Fraternity* [1999**]** 738 So.2d 1105,the court of appeals held that it did not matter that the students were of legal age and presumably could take care of themselves. Regardless, the school had a duty to watch over the behavior of the fraternity because they had a known history of hazing. In a similar case, *Furek v. The University of Delaware* [1991] 594 A.2d 506, the court held that while the doctrine of *in loco parentis* has not usually been established in college and university settings it is applicable in hazing cases on the ground that "where there is direct university involvement in, and knowledge of, certain dangerous practices of its students, the university cannot abandon its residual duty of control." This line of reasoning cannot be discarded in situations where the university has implemented policies to abate hazing practices. In fact, by issuing policies the school or university itself acknowledges it has a duty to protect students from hazing. Furthermore, the courts that have followed this line of reasoning have explained or justified their positions, often stating that the schools themselves are not under the same influence and can both foresee and recognize the possible risks associated with hazing from a more educated standpoint than the general student body. Moreover, the courts state that often the rookies or students being initiated do not fully understand the risks often associated with various acts of hazing. The *Morrison* case illustrates this by stating, "the pledging process to join a fraternal organization is not an activity which an adult college student would regard as hazardous". This statement is echoed by research findings (Hoover, 1999; McGlone, 2005) indicating that students often perceive that they will be isolated from peers or not be accepted into the group or by the group if they do not go along with the initiation process or hazing. 39

In the recent past, courts have held schools accountable for injuries resulting from acts of hazing when the institutions, administration or officials have had knowledge of hazing occurring within their scope of jurisdiction. Case in point, in *Chappel v. Franklin Pierce School District No.402* [1967] No. 402, 71 W.D.2d 16, the court held that since there was a known tradition of hazing occurring at the school, the school 40

could be held responsible for a hazing injury. The court found that the school was liable because the faculty advisor knew of and helped plan the activities that resulted in the injury. The court reasoned "that physical injuries are foreseeable when unsupervised student initiation ceremonies involve physical ordeals on the part of the initiates." In addition, in *Chappel*, the court identified that a connection existed between the school and the off-campus hazing. The court based this connection on the fact that the school had some control over the event. There reasoning included the fact that all clubs which were planning off-campus activities were required to submit the activity for approval by the principal. In addition, the school's policy clearly prohibited hazing. This reasoning by the court provides a subtle signal that if an institution has knowledge of hazing activities involving students, including ones that take place off-campus; the institution may be found to have a duty to protect its students from hazing.

While these cases may increase sensitivity regarding hazing practices other cases have not held such a high standard for the institutions. As in all negligence cases, the issue is to establish whether a duty of care existed and that the institution's breach of said duty was the proximate cause of the resulting injury. Even when courts have found a duty exists, some have stated that while the institution has a responsibility to regulate student organizations, it does not have the responsibility to monitor the behavior of individual students, as this charge would be impossible to do and would severely impact student freedom and the educational missions of universities. In *Rabel v. Illinois Wesleyan University:* "It would be unrealistic to impose upon a university the additional role of custodian over its adult students and to charge it with the responsibility for assuring their safety and the safety of others. Imposing such a duty of protection would place the university in the position of an insurer of the safety of its students. (*Rabel,* as cited in MacLachlan, 2000). 41

Negligent Supervision

An institution can be found to be vicariously liable for injuries occurring as a result of hazing activities if it is found that the damage resulted from negligent supervision. The *Morrison* court found this to be the case, stating that the university's failure to keep an eye on student activities was directly related to the resulting injury. The court stated that the failure was a "precipitating or contributing factor that made it possible for the student to be physically hazed". The court expanded further by stating that the injuries sustained by the plaintiff created legal cause because the activity was "clearly within the scope of protection contemplated by imposition" of a duty to prevent hazing. 42

Vicarious & Premise Liability

As established, institutions of higher education are not typically considered is the insurer of student health and well being. However, judges have imposed institutional liability for breach of a duty of care associated with the role of the institution as a landlord responsible for the safety of campus residents and invitees (Pearson & Beckham, 2005). Courts have frequently recognized the institutional obligation to provide a safe environment. Administrators should be aware of the judicial system's ability to hold institutions liable for student injuries including those done by a third party based on the landlord-tenant relationship. The most recent extension of liability under this theory is that associated with the duty to foresee the likelihood of a third-party assault that would endanger the safety of the student. This potential for institution-as-landlord liability was evident in the case of *Mullins v. Pine Manor College* [1983] 389 Mass. 47, 449 N.E. 2d 706. In this case, a female student used this claim after being abducted and sexually assaulted. The court ruled in favor of the plaintiff, finding the university, as a landowner, was negligent. Furthermore, in the *Furek* case, the university was held liable for the resulting injuries under the premise of landowner – invitee theory. Colleges and universities are considered landowners based upon the reasoning that the institution owns the buildings and facilities on campus. The courts have recognized a landowner's duty to provide reasonable care regarding foreseeable acts (Crow & Rosner, 2002). In this case, the court held that hazing was a foreseeable action of fraternities and that the university was aware of past incidents of fraternity hazing and had attempted to establish polices in order to regulate hazing practices of the students. It was this awareness that created the duty to provide reasonable care to the university's invitees which included students. 43

In *Knoll*, the courts did not limit the duty to on-campus facilities; it extended the standard to property off-campus. Here, a student was injured while trying to get away from being hazed. The hazing activity was taking place off of the campus; however the court articulated that "the University could have foreseen various forms of student hazing on its property, even though [the fraternity] failed to disclose the pledge sneak event, including typical fraternity abductions and the consequences that could reasonably be expected to result from such activities". In both cases, the duty was imposed based upon the fact that the university could have and should have been able to foresee that the hazing acts may occur. This standard would seem obvious given the prevalence of hazing activities on college campuses, the result of which puts universities in a difficult situation of having to prove they have tried to prevent hazing from occurring within their student organizations both on and off campus. 44

APPLICATION OF *IN LOCO PARENTIS*

The courts have grappled with the application of *in loco parentis* standards for many year in cases that involve student safety including incidents of hazing. The legal doctrine of *in loco parentis* describes a 45

relationship that is similar to that of a parent and child without legal formality which is generally temporary in nature (Black, 1990). History shows that prior to the 1960s the legal system recognized a duty on the part of college and university administrators to stand in *"loco parentis".* In other words the courts recognized that campus administrators stood in place of parents. This recognition of duty changed during the 1960s and 1970s. During this time the issue of students' freedom was reevaluated as college students were considered adults under the law. The 1970s ushered the "bystander era" (Treanor, 2005). There were several cases in the late 1970s and 1980s that challenged the previous doctrine. During this time the courts started looking at these cases in terms of establishing if a duty was owed.

In *Bradshaw v. Rawlings* [1979] 612F.2d 135, an off-campus sophomore class party was planned with a faculty advisor who co-signed a check for the purchase of alcohol. The students who attended the party arranged their own transportation to and from the party. After the party, a student was involved in an automobile accident which rendered him quadriplegic. The appellate court reversed the lower court's decision in favor of Bradshaw. The appellate court cited that colleges could not be the insurer of student safety even when an employee had been part of the planning process. 46

In *Beach v. University of Utah* [1986] 726 P.2D 413, a professor was present at an off-campus party following a field trip at which students were drinking. The alcohol consumption continued during the van ride back to the field trip site (a camp site) and a student wandered off and fell from a cliff. In this case, the court refuted the duty of the college to keep students safe, reasoning that college students were old enough to vote and be tried as adults. The college had no duty because the individuals were no longer considered juveniles. In these cases the court set a standard that the university was a "bystander" to student misconduct and that no duty was owed to these students because they were "adults". These cases set the standard that college and universities would not be found to have a legal duty to protect students as previously held under the doctrine of *in loco parentis*. 47

The milieu changed again during the 1990's. During this time courts broadened their range regarding potential institutional liability in regards to student safety and behavior. After the bystander era and to the present day, the courts have seen a switch once again in the progression of the duty owed standard. These cases often use the landowner liability standards to establish that schools as landowners do in fact have a duty to protect students under certain conditions. 48

DEFENSES

When colleges and universities find themselves at the center of a hazing lawsuit, the two defenses most frequently utilized are assumption of risk and sovereign immunity. 49

Assumption of risk

Many cases cite the use of assumption of risk as a defense. The assumption of risk defense has been used effectively in some cases while in others the courts have rejected it, as in *Siesto v. Bethpage Union Free School District* (Staurowsky, 2003). The court in this case suggests that a student athlete assumes the risks of injury which are inherent in sport; however this assumption of risk does not indicate they assume the risk of being injured due to hazing. A total of 20 states provide for consent or willingness on the part of the victim as an available defense (Sussberg, 2003). Consent or willingness to participate is somewhat challenging because many athletes or potential athletes do not consider the possibility of being hazed until they are hazed. The problem with these types of statutes is that the "victims" typically do not have enough information given to them before the hazing occurs to give any type of informed consent. Furthermore, while they may "voluntarily" participate in the hazing activities they may do so only due to the fear that they will not be accepted by the team, or may be eliminated from the team, if they fail to participate in the activities. One would presume that if these athletes knew what was going to happen or that the activities could result in severe physical or mental harm they would not agree to the activity. This may be why most unacceptable hazing activities are performed and carried out secretly. 50

Sovereign Immunity

Sovereign immunity is utilized to protect government employees from liability when performing government functions. This defense may be utilized by public school employees, as they are typically considered state or government employees. However, while many states will not extend this protection when employees act with careless disregard others have broadened the protection when no tangible malice is concerned, as was the case in *Caldwell Griffin v Spalding Board of Education* [1988] 503 S.E. 2d 43County. This case involved a freshman football player who was hazed during summer training camp in the dormitory by other football players. The plaintiff claimed that the school officials had previous knowledge regarding the hazing attacks, and that they therefore had a duty to protect against them. In this particular case, the court found that the school's football coach and its administrators were immune from hazing liability (Crow & Rosner, 2002). 51

CONCLUSION

Hazing has been and most likely will continue to be embedded in the culture of college life. Administrators 52

need to acknowledge that they can be held liable, as illustrated above, for acts of hazing occurring both on and off their campuses. The caselaw demonstrates an incommodious situation for all those who deal with student activities in higher education. It appears that when schools take action to prevent hazing, it also increases the probability that the court can establish that a legal duty of care exists. If that is the case, how do administrators effectively create policy and procedures that will protect both the student population they serve and the institution that employees them?

This conundrum illustrates that college administrators, athletics directors, band directors, student activities officers and coaches must not only be aware of the possibility of hazing and initiation rituals taking place on their campus, but they also need to acknowledge the institutional liability that may occur as a result of hazing. In addition, it is no longer enough to establish a hazing policy. Administrators and everyone involved in overseeing student activities must attempt to be aware and investigate hazing practices that may be occurring within their organizations. Furthermore, schools must not only adopt anti-hazing policies, they must actively try to enforce policies in order to meet the “duty” standard illustrated in the case law. It is vital that all coaches and volunteers be educated on hazing and hazing policies as these individuals will have the most direct contact with students and can influence how hazing and initiation ceremonies are carried out. It is clear that administrators must take a proactive approach to dealing with hazing on campuses in order to help protect everyone from the long arduous process of litigation.

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