St. John's Law Review

Volume 76
Number 1 *Volume 76, Winter 2002, Number 1*

Article 3

February 2012

Institutional and Organizational Liability for Hazing in Intercollegiate and Professional Team Sports

R. Brian Crow

Scott R. Rosner

INSTITUTIONAL AND ORGANIZATIONAL LIABILITY FOR HAZING IN INTERCOLLEGIATE AND PROFESSIONAL TEAM SPORTS†

R. BRIAN CROW†† & SCOTT R. ROSNER†††

INTRODUCTION

Although hazing was originally associated with stereotypical fraternal organizations, it is now common in both interscholastic and intercollegiate sports. Hazing, however, is not limited to amateur athletics. There is a long tradition of hazing rookies in professional team sports.[1] Hazing in sports has received a significant amount of media attention in the last several years, especially on both high school *and* college campuses nationwide. More student-athletes are being prosecuted under state anti-hazing laws and more institutions are being held responsible for their care. This liability may soon be extended to professional athletes and sports organizations due to the frequent hazing of rookie players. In attempting to determine the scope of the hazing problem and liability issues, a definitional question arises as to what actions or behaviors constitute hazing. Actions that are considered hazing by some are not considered hazing and are not objectionable to others. Hazing is defined as "any activity expected of someone joining a group that humiliates, degrades, abuses, or endangers, regardless of the person's willingness to

---

† The authors contributed equally to this article.

†† Assistant Professor, Department of Sport Management, Slippery Rock University.

††† Lecturer, Legal Studies Department, Wharton School, University of Pennsylvania. For a thorough discussion of hazing in the context of interscholastic athletics, see S. Rosner & R.B. Crow, *Institutional Liability for Hazing in Interscholastic Sports*, 39 HOUS. L. REV. 275 (2002).

[1] *See Men Behaving Badly,* TIMES-PICAYUNE, Aug. 26, 1998, at B6 (noting that "hazing . . . is an old NFL tradition," and reporting that five rookies on the National Football League's New Orleans Saints were forced to wear pillow cases over their heads and walk by team veterans "who punched and pushed them").

participate."[2] Traditionally, athletic hazing was limited to relatively benign activities such as having rookies carry travel bags for veteran players or sing team songs in front of others. In recent times, however, these somewhat harmless behaviors have been replaced by potentially dangerous activities such as assault, binge drinking, sexual harassment, and exploitation.[3] Although it is difficult to know exactly how prevalent hazing is in intercollegiate and professional sports, the reporting of athletic hazing has increased dramatically since 1980, both in frequency and severity.[4] Additionally, it is obvious that most instances of hazing occur without being reported to coaches, school or team officials, or law enforcement,[5] despite the fact that they are illegal in forty-three states.[6]

Increasingly, however, students are being charged with criminal hazing.[7] Nonetheless, anti-hazing activists complain that there is no uniformity among the state statutes and that prosecutors are often not educated about the seriousness of hazing.[8] An analysis of current state hazing statutes

---

[2] Nadine Hoover, *National Survey: Initiation Rites and Athletics for NCAA Sports Teams, at* http://www.alfred.edu/news/html/rites_99.html (last visited August 30, 1999) [hereinafter *NCAA Hazing Study*].

[3] *See Sports Hazing Incidents, at* http://espn.go.com/otl/hazing/list.html (April 17, 2000) [hereinafter *Sports Hazing Incidents*] (listing confirmed instances of hazing incidents occurring in competitive sports context); Tom Farrey, *Like Fighting, Part of Game, at* http://espn.go.com/otl/hazing/thursday.html (April 14, 2000).

[4] *See Sports Hazing Incidents, supra* note 3.

[5] *See generally* Farrey, *supra* note 3.

[6] Only Alaska, Hawaii, Michigan, Montana, New Mexico, South Dakota, and Wyoming do not have anti-hazing statutes. *See State Anti-Hazing Law, at* http://www.stophazing.org/laws.html (last visited Feb. 23, 2002) [hereinafter *State Anti-Hazing Law*].

[7] *See Eight Potsdam Players Hit With Hazing Charges,* TIMES UNION, Apr. 4, 1998, at C2; *Twelve Seniors Face Hazing Charges Against Freshmen,* ASSOCIATED PRESS NEWSWIRES, July 8, 2000.

[8] *See* HANK NUWER, WRONGS OF PASSAGE: FRATERNITIES, SORORITIES, HAZING, AND BINGE-DRINKING (1999). The Delaware anti-hazing law provides a very comprehensive definition, describes hazing as:

> [A]ny action or situation *which recklessly or intentionally endangers the mental or physical health or safety of a student* or which willfully destroys or removes public or private property for the purpose of initiation or admission into or affiliation with, or as a condition for continued membership in, any organization operating under the sanction of or recognized as an organization by an institution of higher learning. The term shall include, but not be limited to, any brutality of a physical nature, such as whipping, beating, branding, forced calisthenics, exposure to the

demonstrates the following: (1) the majority of states consider hazing a misdemeanor that does not change the penalty or definition of any activity covered by other criminal statutes;[9] (2) statutes in seven of the forty-three states with anti-hazing laws include language that bars observing or participating in hazing and failing to notify authorities;[10] (3) thirteen of the states with anti-hazing laws require anti-hazing policies to be developed and disseminated at public schools;[11] and (4) twenty states specifically state in their codes that implied or express consent, or a willingness on the part of the victim to participate in the initiation, is not an available defense.[12] Penalties for violation of these statutes are wide raging and include: fines ($10 to $10,000); jail time (ten days to twelve months); a combination of fines and jail time; withholding of diploma; expulsion from

---

> elements, forced consumption of any food, liquor, drug or other substance, or any other forced physical activity which could adversely affect the physical health and safety of the individual, and shall include any activity which would subject the individual to extreme mental stress, such as sleep deprivation, forced exclusion from social contact, forced conduct which could result in embarrassment, or any other forced activity which could adversely affect the mental health or dignity of the individual, or any willful destruction or removal of public or private property. For purposes of this definition, any activity as described in this definition upon which the admission or initiation into or affiliation with or continued membership in an organization is directly or indirectly conditioned shall be presumed to be "forced" activity, *the willingness of an individual to participate in such activity notwithstanding.*

DEL. CODE ANN. tit. 14, § 9302 (1999) (emphasis added). Other state statutes offer vague definitions of hazing, making prosecution under these statutes harder. *See* Andrew Jacobs, *Violent Rites; High School Hazing*, N.Y. TIMES UPFRONT, Apr. 24, 2000, at 8.

[9] *See State Anti-Hazing Laws, supra* note 6 (listing full text of all state hazing laws); *see also* Michael John James Kuzmich, Comment, *In Vino Mortuus: Fraternal Hazing and Alcohol-Related Deaths,* 31 MCGEORGE L. REV. 1087, 1097 (2000).

[10] *See* Kuzmich, *supra* note 9, at 1097. Alabama, Arkansas, New Hampshire, North Carolina, South Carolina, Texas, and Washington all require notification. *See State Anti-Hazing Laws, supra* note 6.

[11] *See State Anti-Hazing Laws, supra* note 6. Arizona, Delaware, Florida, Kentucky, Maine, Minnesota, Missouri, Oklahoma, Pennsylvania, Tennessee, Vermont, West Virginia, and Wisconsin all require schools to adopt anti-hazing policies. *See id.*

[12] *See id.* Arizona, Connecticut, Delaware, Florida, Indiana, Iowa, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, Texas, Utah, Vermont, and Washington do not allow the defense. *See id.*

school; or rescission of the right to assemble on campus.[13] The most common penalty is three to twelve months in jail, a $1,000 fine, or both.[14]

I. HAZING IN INTERCOLLEGIATE SPORTS

A. *Alfred University Study*

In 1998, Edward Coll, Jr,. President of NCAA Division III Alfred University, forfeited one of the school's football games after five players were arrested for hazing freshmen players, including minors, by restraining them with rope and forcing them to drink alcohol.[15] In the aftermath of the incident, administrators conducted a national survey of student-athletes, coaches, and administrators at NCAA-member institutions to identify: (1) the breadth and depth of initiation in college athletics; (2) perceptions of appropriate initiation behavior; and (3) strategies to prevent hazing.[16] Findings from the survey of student-athletes demonstrated the following:

- 45% of the respondents said they knew of, had heard of, or suspected hazing on their campuses.
- 80% reported being subjected to one or more of the listed hazing behaviors, yet only 12% characterized or labeled those activities as "hazing."
- 65% participated in some form of questionable initiation behavior.
- 51% claimed to be involved in alcohol-related initiation activities.
- 21% participated in unacceptable (dangerous) initiation activities, including 16% of female respondents.
- 60% percent of the respondent student-athletes said they would not report hazing to school officials.[17]

The athletes most at risk of being hazed were male swimmers and divers, lacrosse players, soccer players, and

---

[13] *See* Kuzmich, *supra* note 9, at 1097.

[14] *See id.*

[15] *See Alfred Cancels Game Over Hazing*, ASSOCIATED PRESS ONLINE, Sept. 1, 1998, *available at* 1998 WL 6716819.

[16] *See NCAA Hazing Study*, *supra* note 2.

[17] *See id.*

athletes whose institution was domiciled in a state with no anti-hazing law.[18]

B. Hazing Incidents in Intercollegiate Athletics

Some of the most heinous details of any athletic initiation surrounded the recent hazing incident at the University of Vermont. The initiation rites were so atrocious that the president of the university cancelled the remainder of the 1999-2000 hockey season after the players involved attempted to cover up the incident by lying during the subsequent investigation.[19] 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." The pie consisted of seafood quiche doctored with ketchup and barbecue sauce and was accompanied by 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 done determining whether they could drink their own glass of beer or someone else's. They also paraded around naked, performing an "elephant walk" in which the players held each other's genitals.[20]

The Attorney General of Vermont rebuked the university for its inadequate investigation into the incident, and the state legislature subsequently enacted anti-hazing legislation.[21] A university report produced fifty-three recommendations to remedy the problem, largely based on the Alfred University study. The university settled a lawsuit filed by former walk-on goalie Corey LaTulippe for $80,000.[22] The university estimated the total cost to the institution in settlements, lost revenues,

---

[18] *See id.*

[19] *See Vermont Ends Season Over Hazing Scandal, at* http://espn.go.com/nch/2000/0114/290846.html (last visited on June 7, 2000).

[20] *Report Faults U. of Vermont's Investigation of Hockey Team Hazing*, CHRON. OF HIGHER EDUC., Feb. 18, 2000, at A63; *see also* Bob Duffy, *A Matter of Rite and Wrong in the Wake of the UVM Case, Debate Is Renewed on Whether Initiations Are Harmless Bonding Rituals or Outright Abuse*, BOSTON GLOBE, Feb. 13, 2000, at D1.

[21] *See State Report on Hazing Case*, USA TODAY, Feb. 4, 2000, at 2C.

[22] *See* Andy Gardiner, *Hazing Scandal Rips Apart Town, School, University of Vermont Still Has Scars*, USA TODAY, Feb. 5, 2001, at 1C.

legal fees, and public relations costs at $485,000.[23]

Despite the fact that it received the most media attention, the University of Vermont is hardly alone among universities facing hazing scandals. From prestigious universities such as Yale to state institutions including the University of Maryland and Georgia Southern University to small colleges like Marian College, located in Wisconsin, reports of hazing have recently occurred at many different types of institutions.[24] In addition, lawsuits have not been limited to hazing incidents involving male athletes.[25] A former University of Oklahoma female soccer player charged her former coach with "physical and mental abuse" in a federal lawsuit against the coach, her two assistants, and the university's board of regents stemming from an incident that occurred in 1997. The victim, then a freshman, was forced to perform simulated oral sex with a banana while blindfolded and wearing an adult diaper.[26] The humiliated victim, out of fear of losing her scholarship, did not report the incident for a year. She came forward after pictures of the hazing, taken by some teammates, were shown to the university athletic director. The coach resigned at the onset of the investigation citing personal reasons, and the victim transferred to a smaller school closer to her family.[27] As of this writing, the original federal lawsuit had been dismissed, but the plaintiff plans to file an amended complaint.[28]

C. *Legal Aspects of Hazing in Intercollegiate Sports*

Given the increased frequency with which these incidents are being reported, it is important to understand the potential liability of colleges and universities for the hazing of its student-athletes. The primary theory that many plaintiffs rely upon is negligence.[29] In order to recover under this claim, a plaintiff

---

[23] *Id.*

[24] *See Sports Hazing Incidents, supra* note 3.

[25] *See* Greg Garber, *It's Not All Fun and Games, at* http://espn.go.com/otl/hazing/Wednesday.html (April 14, 2000).

[26] *See id.*

[27] *See id.*

[28] *Judge Dismisses University From Lawsuit,* ASSOCIATED PRESS NEWSWIRES, Apr. 13, 2000.

[29] *See* Jenna MacLachlan, *Dangerous Traditions: Hazing Rituals On Campus and University Liability*, 26 J.C. & U.L. 511, 512 (2000).

must establish four elements: (1) the existence of a legal duty of care on the defendant's behalf to adhere to a standard of care to protect the plaintiff from unreasonable risks; (2) a breach of this duty; (3) actual and proximate causation; and (4) a resulting injury to the plaintiff.[30] The threshold requirement is a legally recognized duty of care.[31] Thus, an institution will not be held liable for the hazing injuries suffered by its student-athletes unless it can be proven that a duty of care was owed to them by the institution. There are three theories that these plaintiffs may rely upon to establish the presence of this duty of care: (1) the doctrine of *in loco parentis*; (2) the landowner-invitee theory; and (3) the existence of a special relationship between a university and its student-athletes. Each of these theories will be analyzed in the sections below.

1. In Loco Parentis

Traditionally, colleges and universities operated under the doctrine of *in loco parentis*, or "in place of the parents," as they dominated the lives of their students. Through this doctrine, schools were held responsible for the welfare of students in their care.[32] When society began to view college students as adults in the 1970s, however, courts began to hold that colleges had no duty to protect their students.[33] Consequently, the doctrine of *in loco parentis* seems to have met its demise on college campuses. It therefore seems unlikely that a student-athlete injured during a hazing incident could seek recourse under this doctrine. Yet this wave of "no duty" decisions is undergoing a change of course in the area of hazing activities.[34] The courts, however, have not reinstated the doctrine of *in loco parentis* to establish a duty of care. Instead, they are relying on traditional tort law to treat college and university defendants the same as landlords, i.e., with a duty to act reasonably.[35]

---

[30] *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164–65 (5th ed. 1984).

[31] *See id.*

[32] *See* MacLachlan, *supra* note 29, at 512, 514.

[33] *See id.* at 515; *see also* Knoll v. Bd. of Regents of the Univ. of Neb., 601 N.W.2d 757 (Neb. 1999); Furek v. Univ. of Del., 594 A.2d 506 (Del. 1991).

[34] *See* MacLachlan, *supra* note 29, at 539 (noting that the "decisions indicate that the trend toward university responsibility for hazing incidents will continue").

[35] *See id.* at 513.

2. Liability Under a Landowner-Invitee Theory

A student-athlete injured during a hazing incident may be able to successfully recover against the institution under a landowner-invitee theory. Universities are considered landlords to their student-athletes based on the ownership of campus dormitories and buildings.[36] Generally, a landlord has a duty to aid or protect those invitees who enter his land.[37] This duty, which is one of reasonable care, extends only to reasonably foreseeable acts.[38] Hence, a landlord has no duty to ensure his visitor's safety.[39] In *Furek v. University of Delaware*, the Delaware Supreme Court held that a fraternity hazing incident, which occurred on university-owned property, was foreseeable.[40] The university was aware of both past and continuing hazing practices in fraternities and had previously attempted to regulate it.[41] Because of this awareness, the university had a duty to regulate dangerous activities occurring on its property.[42]

While it was generally thought that the university's duty applied only to on-campus acts,[43] the Supreme Court of

---

[36] *See* Gil B. Fried, *Illegal Moves Off-The-Field: University Liability for Illegal Acts of Student-Athletes*, 7 SETON HALL J. SPORT L. 69, 77 (1997).

[37] *See* RESTATEMENT (SECOND) OF TORTS, § 314A(3) (1965). This section, entitled "Special Relations Giving Rise to Duty to Aid or Protect," provides that "[a] possessor of land who holds it open to the public is under a [duty to aid or protect] to members of the public who enter in response to his invitation."

[38] *See* RESTATEMENT (SECOND) OF TORTS § 344 (1965).

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Id.

[39] *See id.* This Restatement comment states that a landowner with knowledge of the likelihood that the safety of his invitees will be endangered by third parties may have a duty to protect the invitees. *See id.*

[40] *See* 594 A.2d 506, 522 (Del. 1991).

[41] *Id.* at 510–11.

[42] *Id.* at 522.

[43] *See* Jennifer L. Spaziano, *It's All Fun and Games Until Someone Loses an Eye: An Analysis of University Liability for Actions of Student Organizations*, 22 PEPP. L. REV. 213, 221–22 (1994) (analyzing the University's liability for actions resulting in harm on the University campus after the University has taken protective measures for student safety); *see also* Michelle D. McGirt, *Do Universities*

Nebraska has extended this duty to off-campus acts as well in *Knoll v. Board of Regents of the University of Nebraska*.[44] The court held that the university had an obligation to protect the plaintiff, who was severely injured while trying to escape a hazing incident.[45] Despite the fact that the fraternity house was privately owned and was located off campus, it was considered to be a student housing unit subject to the university's code of conduct.[46] The court concluded that the university owed their students a duty under a landowner-invitee theory to protect them from *foreseeable* acts of hazing.[47] The court reasoned that because the student's abduction occurred on the university's property, it was irrelevant that the harm occurred off-campus.[48] The implication of this decision is that when hazing is foreseeable in a given situation, the school and administrators can be held responsible for not taking steps to prevent it regardless of whether the harmful incident occurs on or off campus.[49]

Pursuant to the court's holding in *Furek*, a victimized student-athlete may recover damages if the hazing occurred on university-owned property[50] and was reasonably foreseeable. The court's holding in *Knoll* may allow an injured student-athlete to recover against the institution even if the foreseeable hazing occurred off of the university's property.[51] In either case, hazing will be foreseeable only if the university knew or should have known about it. This standard can be easily satisfied if there has been a tradition of hazing at the university. On the other hand, it may be argued that *all* hazing incidents are foreseeable given the prevalence of hazing among student-

---

Have a Special Duty of Care to Protect Student-Athletes From Injury? 6 VILL. SPORTS & ENT. L.J. 219, 221 (1999); Edward H. Whang, *Necessary Roughness: Imposing a Heightened Duty of Care on Colleges for Injuries of Student-Athletes,* 2 SPORTS LAW. J. 25, 32 (1995).

[44] *See* Knoll v. Bd. of Regents of the Univ. of Neb., 601 N.W.2d 757 (Neb. 1999).

[45] *Id.* at 765.

[46] *See id.* at 761–62, 764.

[47] *See id.* at 762, 765.

[48] *See id.* at 764.

[49] *See id.* at 764–65.

[50] This includes locker rooms, athletic facilities, dormitory rooms, and many off-campus housing units.

[51] This is particularly problematic for universities, as most intercollegiate hazing incidents occur in the off-campus homes of team upperclassmen.

athletes.[52] Institutions may have a duty to protect the student-athletes from hazing if the landlord-invitee theory is established, but recovery may be constrained by the location in which the hazing occurs.

3. Liability Arising out of the Special Relationship Between Student-Athletes and Colleges

Student-athletes injured in hazing accidents might also argue that the special relationship between the university and its student athletes creates a duty of care.[53] A basic tenet of tort law is that no duty of care exists between two parties unless they have a special relationship.[54] Common examples of special relationships are parent and child, common carrier and passenger, innkeeper and guest, and landowner and invitee.[55] Although this list is not exhaustive,[56] courts are reluctant to find

---

[52] *See* Tanja H. v. Regents of the Univ. of Cal., 278 Cal. Rptr. 918, 922 (Cal. Ct. App. 1991) (holding that statistical evidence of a general level of criminal activity does not, in and of itself, create the requisite level of foreseeability). *See generally* Kleinknecht v. Gettysburg College, 989 F.2d 1360 (3d Cir. 1993); Kennedy v. Syracuse Univ., No. 94–CV–269, 1995 WL 548710 (N.D.N.Y. Sept. 12, 1995).

[53] *See* Spaziano, *supra* note 43, at 228–30 (noting that courts have been reluctant to apply this special relationship to university-student relationships).

[54] *See* RESTATEMENT (SECOND) OF TORTS § 315 (1965). This section provides:

> There is no duty to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives rise to the other a right to protection.

Id.; *see also* Whang, *supra* note 43, at 33.

[55] *See* RESTATEMENT (SECOND) OF TORTS § 314A (1965). The Restatement (Second) of Torts provides:

> (1) A common carrier is under a duty to its passengers to take reasonable action
>
> (a) to protect them against unreasonable risk of physical harm, and
>
> (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.
>
> (2) An innkeeper is under a similar duty to his guests.
>
> (3) A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.
>
> (4) One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other.

Id.

[56] *See id.* ("The duties stated in this Section arise out of special relations

that a special relationship exists between a university and its students,[57] and therefore, generally find universities do not owe a duty of care to their students.[58] Courts view college students as adults who can take care of themselves and protect their own interests.[59] Furthermore, colleges have been viewed not as custodial institutions,[60] but rather as educational institutions that do not ensure the safety of their students.[61] Courts have maintained that to decrease college students' autonomy by making the students' own safety the responsibility of the institution would "produce a repressive and inhospitable environment, largely inconsistent with the objectives of a modern college education."[62]

Despite the general failure of courts to recognize a special relationship between a university and its students that gives rise to a duty of care, several courts have found the existence of a special relationship between a university and its student-athletes.[63] In *Kleinknecht v. Gettysburg College*, the Third Circuit held that an intercollegiate athlete participating in a

---

between the parties .... The relations listed are not intended to be exclusive, and are not necessarily the only ones in which a duty of affirmative action for the aid or protection of another may be found.")

[57] *See* Spaziano, *supra* note 43, at 228.

[58] *See* Bradshaw v. Rawlings 612 F.2d 135, 141–42 (3d Cir. 1979); Univ. of Denver v. Whitlock, 744 P.2d 54, 55 (Colo. 1987) (holding no duty where a student was injured while using a trampoline in an unsafe condition located on the front lawn of a house leased from the University); Rabel v. Ill. Wesleyan Univ., 514 N.E.2d 552, 560–61 (Ill. App. Ct. 1987); McGirt, *supra* note 43, at 225. *See generally* Beach v. Univ. of Utah, 726 P.2d 413 (Utah 1986).

[59] *See* Whang, *supra* note 43, at 35.

[60] *See Beach*, 726 P.2d at 419.

[61] *See Bradshaw*, 612 F.2d at 138.

[62] *Whitlock*, 744 P.2d at 60 (quoting *Beach*, 726 P.2d at 419).

[63] *See* Kleinknecht v. Gettysburg College, 989 F.2d 1360, 1369 (3d Cir. 1993) (predicting that the Supreme Court of Pennsylvania would hold that the University owed a duty of care to a student engaged in school-sponsored collegiate athletic activity for which he had been recruited); Kennedy v. Syracuse Univ., No. 94–CV–269, 1995 WL 548710, at *2 (N.D.N.Y. Sept. 12, 1995). Interestingly, neither the university nor the defendant denied that the university owed a reasonable duty of care to the student-athletes. Nonetheless, the court granted the university's motion for summary judgment due to the plaintiff's inability to establish proximate cause. *Id.* at *4. *But see* Orr v. Brigham Young Univ., 108 F.3d 1388 (10th Cir. 1997) (refusing to recognize a special relationship between a university and its student-athletes); Fox v. Bd. of Supervisors of La. State Univ. and Agric. and Mech. Coll., 576 So. 2d 978, 983 (La. 1991) (holding that LSU. had no affirmative duty to act in protection of the visiting student athlete since there was no special relationship).

college-sponsored athletic activity for which he was recruited, was owed a duty of reasonable care while acting in this capacity.[64] The court focused on three factors in finding that a special relationship existed between the university and the student-athlete.[65] First, the student-athlete was actively recruited by the institution to play intercollegiate lacrosse.[66] The court stated that "[w]e cannot help but think that the College recruited [the student-athlete] for its own benefit, probably thinking that his skill at lacrosse would bring favorable attention and so aid the College in attracting other students."[67] Second, the student-athlete was participating in his college team's practice session when he was stricken.[68] The court distinguished this class of individuals from those students injured while pursuing their own private interests;[69] the former group is owed a duty of care, while the latter group is not.[70] Third, the court recognized that the duty of care is owed only when the foreseeable risk of harm is unreasonable.[71] Noting that it was reasonably foreseeable that a life-threatening injury could occur during athletic participation, the court held that the college owed a duty of care to take precautions against such an injury.[72]

If a special relationship between a university and its student-athletes exists, it is still unclear whether a student-athlete injured during a hazing incident may succeed in recovering under this theory. The court's finding of a special relationship between the university and the student-athlete in *Kleinknecht* was based on three enunciated factors: (1) the injured athlete must be "actively recruited"; (2) the athlete must

---

[64] 989 F.2d at 1369. In *Kleinknecht*, the parents of a student-athlete who suffered a fatal heart attack during a supervised practice session brought a wrongful death action against the institution for its failure to provide prompt medical treatment. *Id.* at 1362

[65] *See* McGirt, *supra* note 43, at 232–33.

[66] *See Kleinknecht*, 989 F.2d at 1367.

[67] *Id.* at 1368.

[68] *See id.*

[69] *See id.*

[70] *See id.* The court noted that had the plaintiff been injured while acting as a private student in a fraternity football game, the college may not have owed him a duty of care. *See id.*

[71] *See id.* at 1369.

[72] *See id.* at 1370.

be acting in an athletic capacity while injured; and (3) both the hazing and the resulting injury must be reasonably foreseeable. The absence of any of these factors could preclude a similar finding in future hazing litigation. First, the injured student athlete must have been "actively recruited" to play the sport.[73] If walk-ons are excluded from this definition, then any such individuals who are injured during a hazing incident would likely be unable to recover against the institution. They would lack the requisite "special relationship" with the institution and thus no duty of care would be owed to them. This distinction seems arbitrary and would result in the university owing a duty of care to team members recruited out of high schools but not to others. Though a court may be unwilling to engage in such line-drawing, the Third Circuit's decision allows this to remain a possibility.

Most problematic for student-athletes injured during hazing incidents is the court's requirement that the intercollegiate student-athlete should be acting in an athletic capacity in order to be owed a duty of care.[74] The Third Circuit's inconsistent descriptions of this factor make it very difficult to determine when the duty of care is owed.[75] Although the differences in these phrases appear slight, the linguistic subtleties may have a substantial impact on whether a university owes a duty of care to a student-athlete injured during a hazing incident. Alternatively, the court noted that a special relationship existed when the student-athlete was "participating in a scheduled athletic practice for an intercollegiate team sponsored by the College under the supervision of College employees";[76] "participating as one of its intercollegiate athletes in a school-sponsored athletic activity";[77] "in his capacity as an intercollegiate athlete engaged in school-sponsored intercollegiate athletic activity";[78] and "[participated in] an athletic event involving an intercollegiate team of which he was

---

[73] *Id.* at 1367. The Third Circuit did not delineate whether this term applies only to athletes recruited from high schools or whether it includes those recruited from the institution's student body.

[74] *See id.* at 1367–68.

[75] *See supra* notes 63–72 and accompanying text.

[76] *Kleinknecht*, 989 F.2d at 1367.

[77] *Id.* at 1373.

[78] *Id.* at 1369.

a member."[79]

These standards imply that the existence of a special relationship between a university and its student-athletes depends on the circumstances involved and arises only when the individual is actually playing the sport. A student-athlete faced with these standards is unlikely to recover. Hazing injuries do not occur during either "intercollegiate athletic activity" or "athletic events" and are not "school-sponsored."

In describing when a duty of care is owed to the student-athlete, the court also used phrases such as "participating in an intercollegiate athletic program,"[80] "participating as an intercollegiate athlete in a sport for which he was recruited,"[81] and "in his capacity as a school athlete."[82] These phrases may establish a basis upon which a student-athlete may recover for hazing injuries, as they imply a looser standard of liability based mainly on the individual's status as an intercollegiate athlete.[83] Hazing is traditionally a de facto requirement of participating on intercollegiate athletic teams. A student-athlete has no choice but to be hazed, and failure to do so may negatively impact his athletic experience due to the numerous social costs that will be imposed. If a court recognizes this and interprets hazing as an aspect of "participating in an intercollegiate athletic program," then universities will owe its student-athletes a duty of care to protect them from hazing injuries.[84] Under this interpretation, student-athlete injured during a hazing incident will likely recover in a negligence suit.

Finally, both the hazing itself and the resulting injury must be reasonably foreseeable before a university will owe its student-athletes a duty of care to take precautions against both the incident and the injuries.[85] This is the easiest hurdle for plaintiffs to overcome. Based on the prevalence of hazing among intercollegiate athletes, it is likely that a hazing incident may be considered foreseeable. It is also foreseeable that serious

---

[79] *Id.* at 1368.
[80] *Id.* at 1367 n.5.
[81] *Id.* at 1368.
[82] *Id.* at 1372.
[83] *See supra* notes 8–19 and accompanying text.
[84] *See Kleinknecht*, 989 F.2d at 1367 n.5.
[85] *See id.* at 1370.

injuries will be suffered by hazing victims.[86] Therefore, institutions must take reasonable precautions to prevent hazing from occurring.

II. HAZING IN PROFESSIONAL SPORTS

There is also a long tradition of hazing in professional team sports. Similar to the hazing that occurs at the high school and collegiate levels, hazing in professional team sports is meant to indoctrinate nascent professional athletes into their new surroundings and promote team bonding.[87] In addition, hazing supposedly serves the purpose of keeping players freshly minted with lucrative contracts from getting the enhanced ego that often comes with sudden affluence.[88] Beyond keeping the rookie's "feet on the ground" and amusing the veteran players, the hazing is meant to teach respect for the culture of the sport at the professional level.[89]

Although all rookies in every league are forced to perform chores such as carrying the veterans' bags on road trips,[90] the form of the hazing varies slightly from sport to sport. In Major League Baseball, players are often forced to wear dresses and other embarrassing outfits in public[91] after returning to their lockers after a game or practice and finding their clothes either missing or destroyed.[92] Rookies have not always accepted these pranks as well as Baltimore Orioles' infielder Jerry Hairston, when he wore a full Baltimore Ravens uniform, provided for him by his veteran teammates, out of the Yankee Stadium clubhouse

---

[86] *See supra* notes 10–12 and accompanying text.

[87] *See* Josh Peter, *Ditka's Order Fails to Stop Brutal Hazing, Foul Play Casts Cloud Over Saints*, TIMES-PICAYUNE, Aug. 30, 1998, at A1.

[88] *See* Richard Hoffer & Kostya Kennedy, *Praising Hazing*, SPORTS ILLUSTRATED, Sept. 13, 1999, at 31.

[89] *See* Jim Parque, *Rookie Hazing Fun If You're Not the Victim*, CHICAGO SUN-TIMES, July 30, 2000, at 139. Parque, a veteran pitcher for the Chicago White Sox, stated, "[V]eterans utilize this degrading form of teasing as a tool to teach the youngsters how to act and hold themselves as professionals. The hazing, if done properly, teaches the rookies respect for the game, respect for their elders and respect for themselves. It is a way of introducing these young men into the world of major-league baseball and also a way of getting to know what a rookie is like on the inside." *Id.*

[90] *See* John Eisenberg, *Humiliation, Pain Are Its Only Products*, BALTIMORE SUN, Sept. 17, 1999, at 1D.

[91] *See* Parque, *supra* note 89.

[92] *See* Eisenberg, *supra* note 90.

after a game.[93] When a similar prank was played on Former Oriole and current New York Met pitcher, Armando Benitez during his rookie season, Benitez was so angry that he nearly asked to be traded.[94]

In the National Hockey League, rookies traditionally have been subjected to a full-body shave. This physical mistreatment has been replaced on some teams by a financial one, with rookies paying for prohibitively expensive team dinners at upscale restaurants.[95] For example, during the 1999-2000 Vancouver Canucks season, three rookies were forced to split the cost of a $10,000 team dinner.[96]

Due to the physical nature of the sport, perhaps it should not be surprising that the hazing in the National Football League ("NFL") is traditionally a bit more extreme than in other sports.[97] Beyond carrying veterans' helmets and shoulder pads off of practice fields and singing their colleges' fight songs at training camp meals,[98] rookies are exposed to a variety of physical hazings, many of which are potentially dangerous. Activities such as head shaving,[99] wrestling teammates,[100] taping to goalposts,[101] and setting off fireworks inside players' rooms and automobiles[102] have been *de rigeur* in the NFL for a long time but were largely ignored by the NFL teams despite their hazards.[103] This attitude was changed by an outrageous hazing

---

[93] *See id.*

[94] *See id.*

[95] *See* Michael Farber, *Bumper Crop*, SPORTS ILLUSTRATED, Nov. 22, 1999, at 54.

[96] *See id.*

[97] *See supra* notes 86–87; *see also infra* notes 99–104.

[98] *See* Brian Allee-Walsh, *Rookies Keep Cool-Headed During Hazing*, TIMES-PICAYUNE, Aug. 3, 1997, at C4.

[99] *See* Gary Myers, *Rookie Hazing Has No Place in NFL Camps*, NEW YORK DAILY NEWS, Aug. 30, 1998, at 110.

[100] *See* Allee-Walsh, *supra* note 98. NFL Hall-of-Famer Mike Ditka was forced to do this as a rookie with the Chicago Bears in 1961. *See id.*

[101] *See* Hoffer, *supra* note 88. The Cleveland Browns have engaged in this activity. *See id.*

[102] *See* Mark Heisler, *The Inside Track*, L.A. TIMES, Sept. 3, 1998, at C2. Longtime NFL player Albert Lewis suffered the indignity of having his bed set on fire with him in it as a rookie with the Kansas City Chiefs. Stoney Case was subjected to both mistreatments as a rookie quarterback with the Arizona Cardinals. *See id.*

[103] *See* Mike Freeman, *Hazing, A Longtime NFL Tradition, May Have Seen Its Last Days*, N.Y. TIMES, Oct. 25, 1998, at 2.

incident involving the New Orleans Saints on their last night of training camp in 1998. This event led to an increased awareness of hazing and the adoption of a "no hazing" policy by several NFL teams.[104]

A. *New Orleans Saints Hazing Incident*

The last night of training camp is usually cause for great celebration amongst professional football players, as it marks the end of the most intense period of preseason practices. For the New Orleans Saints, however, the celebration on August 20, 1998 devolved into something much more serious when the team was involved in a hazing incident in the players' dormitory at University of Wisconsin-LaCrosse.[105] As a veteran player read the names of the rookies off of a list, each one was forced to wear a pillowcase over his head and run down a dormitory hallway as a gantlet of twenty to thirty veterans punched, kicked, elbowed, and swung bags of coins at them.[106] Three of the five players who ran the gantlet before campus security guards arrived required medical treatment.[107] Defensive tackle Jeff Danish required thirteen stitches in his left arm after crashing through a window at the end of the hallway; tight end Cam Cleeland suffered a detached fluid sac in his retina after getting hit in the eye with a bag of coins; and wide receiver Andy McCullough underwent an MRI after becoming dizzy and suffering a bloody nose due to blows to the head.[108] While Cleeland missed one week of practice and an exhibition game because of his injury, Danish was not as fortunate.[109] His wound opened in an

---

[104] *See* Myers, *supra* note 99. Former Cleveland Browns coach Chris Palmer had a policy forbidding any form of hazing. *See* Aaron Portzline, *No Hazing for Browns, Palmer Won't Allow Vets To Abuse Rookies,* COLUMBUS DISPATCH, July 24, 1999, at 7E; *see also* Mark Potash, *A Nice Reception for Rookie McNown,* CHICAGO SUN-TIMES, Aug. 4, 1999, at 116.

[105] *See Former Saints Rookie Describes Hazing*, N.Y. TIMES, Aug. 28, 1998, at C4.

[106] *Id.*; *see also* Jonathan Rand, *Hazing Incident Simply a Disgrace*, KANSAS CITY STAR, Aug. 30, 1998, at C4.

[107] *See* Peter, *supra* note 87; Tom Archdeacon, *Saints Struck Dumb by Brutal Hazing,* DAYTON DAILY NEWS, Sept. 5, 1998.

[108] *See* Peter, *supra* note 87; Archdeacon, *supra* note 107. Two other players, offensive guard Kyle Turley and linebacker Chris Bordano, did not require medical treatment and other Saints rookies were spared the gauntlet after the security guards arrived. *See* Peter, *supra* note 87.

[109] *See* Dave Lagarde, *NFL's Probe of Hazing is Sham,* TIMES-PICAYUNE, Sept.

exhibition game several days later, causing him to leave the game; he was released by the team shortly thereafter.[110] The players responsible for the hazing went largely unpunished, though the Saints traded the only player who admitted his involvement.[111] Two other players alleged to be involved in the hazing were subsequently released.[112] The NFL did not impose punishment on any player after conducting its own investigation.[113]

B. Aftermath of the Hazing Incident

As a result of this incident, Danish filed a lawsuit against the Saints, six players, and an assistant coach seeking $650,000 in damages for lost wages, medical expenses, pain and suffering, residual scarring, public ridicule, humiliation, and loss of enjoyment of life.[114] The lawsuit alleged that the Saints "knew or should have been aware of the training-camp incident before it happened and did nothing to prevent it."[115] The lawsuit alleged a lack of any team staff located in close proximity to the team's living quarters. It also averred that Corey attended a meeting at which an announcement of the planned hazing was written on a blackboard hours after Coach Mike Ditka specifically instructed the players not to haze rookies for the

---

22, 1998, at E1.

[110] *See* Peter, supra note 87. According to the campus report filed in connection with the incident, perhaps Danish *should* be considered fortunate. The report stated that had a board not been in place across the window, Danish likely would have gone completely through it and plunged three floors to the ground. *See* Josh Peter, *Report on Hazing Mentions Blood,* TIMES-PICAYUNE, Sept. 16, 1998, at D8.

[111] Linebacker Andre Royal was dealt to the Indianapolis Colts shortly after his admission. *See* Mike Strom and Brian Allee-Walsh, *Hazing Decision Not Surprising,* TIMES-PICAYUNE, Sept. 22, 1998, at E4.

[112] *See* John DeShazier, *Saints' Silence Proving Less Than Golden,* TIMES-PICAYUNE, Oct. 22, 1998, at D1. It should be noted that neither player's involvement was proven, nor did the club confirm that the players, linebacker Brian Jones and guard Isaac Davis, were released because of the incident. The speculation was based on the fact that the two players were vying for starting positions and were named as defendants in a lawsuit later brought by Danish. *See id.*

[113] *See* Strom and Allee-Walsh, *supra* note 111.

[114] *See* Mike Strom and Brian Allee-Walsh, *Saints, Players Sued by Danish,* TIMES-PICAYUNE, Oct. 22, 1998, at D1. The six players were Brady Smith, Keith Mitchell, Troy Davis, Andre Royal, Brian Jones, and Isaac Davis. The assistant coach was defensive line coach Walt Corey. *See id.*

[115] *Id.*

second time during the training camp.[116] Danish and the Saints reached an out-of-court settlement for an undisclosed sum in early 1999.[117] The Saints adopted a "zero-tolerance" policy towards hazing the next season and vowed to release any player involved in a hazing incident, including the victim.[118] The players were notified of this policy by team President and General Manager Bill Kuharich and Coach Ditka at a meeting on the first day of training camp.[119] The team also moved the team's training staff closer to the players in the dormitories and urged the veteran players to display stronger leadership to prevent any hazing incidents.[120]

While the Saints' incident received the most media attention, it is clear that hazing in professional sports is not limited to any one organization. Hazing is prevalent in professional sports and it is likely that similar cases will arise in the future. Although the lawsuit that resulted from the New Orleans Saints incident settled before there were any trial court proceedings, it is appropriate to review the legal principles that would apply in a lawsuit against a professional sports team by an athlete injured during a similar incident.

---

[116] *See id.; see also* Mike Strom, *Ditka Warns Against Hazing,* TIMES-PICAYUNE, July 30, 1999, at D1 (emphasizing that there was an individual stationed at the dormitory's front desk and a security guard patrolling inside and outside the building at the time of the incident). At least one NFL team, the New York Giants, has two weight coaches reside in the dormitories with the players during training camp to prevent any incidents. *See* Myers, *supra* note 99.

[117] *See* Josh Peter, *Danish, Saints Settle Lawsuit,* TIMES-PICAYUNE, Feb. 2, 1999, at E1. The settlement covered the team, the assistant coaches and every player except Andre Royal. *Id.* The suit against Royal was later dismissed after Danish's attorneys did not pursue it any further. *See Court Dismisses Danish's Lawsuit,* TIMES-PICAYUNE, April 16, 1999, at 7D.

[118] *See* Strom, *supra* note 116.

[119] *See id.* This "zero-tolerance" policy is a misnomer, as it applied only to physical contact; rookies could still be forced to sing their fight songs and carry veterans' shoulder pads and helmets. *Id.* Head coach Mike Ditka addressed the provision of the policy that would release the hazed player as well by stating, "[I]f he won't fight back and resist, then I want him out of here, too.... If we'd had guys that would have stood up last year and said, 'Hey I don't want no part of this,' then it would have ended right there...." *Id.*

[120] *See* Strom, *supra* note 116.

III. APPLICATION OF LEGAL PRINCIPLES TO HAZING IN PROFESSIONAL SPORTS

Due to the dangerous nature of hazing and the surging number of well-publicized incidents among college and high school students, forty-three states have enacted or have encouraged the enactment of anti-hazing laws.[121] The vast majority of these statutes, however, only address hazing within the educational context. Only Indiana, Mississippi, New York, and Utah do not limit the application of hazing laws to student groups.[122] Thus, only professional athletes and teams located in these four states are subject to anti-hazing laws. In the absence of an applicable statute, common law remedies are available for professional athlete hazing victims against both the employer team and employee teammates. The following sections outline these theories of liability.

A. *Workers' Compensation*

Employees injured during the course of their employment typically must file a claim under the applicable state's workers' compensation statute in order to be compensated for their injuries.[123] Due to the exclusive nature of these statutes, employees are precluded from recovering in tort against their employers for their injuries.[124] These employees forfeit their tort claims in exchange for "timely, scheduled payments" for their injuries. But an intentional tort exception exists that allows an employee to avoid the reach of the workers' compensation statute and pursue tort remedies against the employer.[125] In order for this exception to apply, the employer must either act intentionally or deliberately with a specific intent to harm the

---

[121] *See State Anti-Hazing Law*, *supra* note 6.

[122] *See* IND. CODE § 34-30-2-150 (1998); MISS. CODE ANN. § 97-3-105 (2001); N.Y. PENAL LAW § 120.16 (McKinney 1998); UTAH CODE ANN. § 76-5-107.5 (1999). All other state hazing laws are *available at* http://www.stophazing.org/laws.html.

[123] *See* Ann E. Phillips, Comment, *Violence in the Workplace: Reevaluating the Employer's Role*, 44 BUFF. L. REV. 139, 150 (1996).

[124] *See id.*; *see also* Janet E. Goldberg, *Employees with Mental and Emotional Problems—Workplace Security and Implications of State Discrimination Laws, The Americans With Disabilities Act, The Rehabilitation Act, Workers' Compensation, and Related Issues*, 24 STETSON L. REV. 201, 233 (1994).

[125] *See* David Minneman, Annotation, *Workers' Compensation Law as Precluding Employee's Suit Against Employer For Third Person's Criminal Attack*, 49 A.L.R. 4TH 926, 932 (1986) (quotations omitted).

employee.[126] This exception extends to an employer with suspicion or knowledge of a potentially harmful condition who allows the condition to persist.[127] While workplace violence lawsuits arising under the intentional tort exception may vary in their results,[128] claims of contributory negligence, assumption of risk, and employee negligence are unavailable to employers as defenses.[129] These lawsuits may include the negligence-derived claims of negligent hiring and retention, negligent supervision, and breach of a voluntary assumption of a duty to protect. Under any of these theories, a plaintiff needs to prove "the elements of common law negligence—duty, breach, cause, and harm."[130] A determination of employer liability often turns on the issue of whether a duty of care was owed to the employee. The existence of any legal duty is an issue for the court, while foreseeability is determined by the trier of fact.[131] Foreseeability depends on whether the defendant's conduct is likely to cause the type of injury suffered by the plaintiff.[132] An injury may be foreseeable based on either "prior similar incidents" or the "totality of the circumstances," alternative tests that are used by most courts in determining this issue.[133]

In each cause of action, the injured employee alleges that the employer did not exercise due care to prevent the intentional acts of the co-employees.[134] As one commentator noted, "Two common fact scenarios surround allegations of managerial

---

126 *See id.*

127 *See id.*

128 *See* Robert L. Levin, *Workplace Violence: Navigating Through the Minefield of Legal Liability*, 11 LAB. LAW. 171, 175 (1995) (discussing results of cases resulting in millions of dollars in settlements and bad publicity).

129 *See* Terry S. Boone, *Violence in the Workplace and the New Right to Carry Gun Law—What Employers Need to Know*, 37 S. TEX. L. REV. 873, 877 (1996).

130 Stephen J. Beaver, Comment, *Beyond the Exclusivity Rule: Employer's Liability for Workplace Violence*, 81 MARQ. L. REV. 103, 108 (1997).

131 *See id.* at 108–09.

132 *See id.* at 109.

133 *See* Phillips, *supra* note 123, at 169–70. The prior similar incidents test looks at factors such as "the proximity, time, number, and types of prior violent incidents in determining whether the particular harm was foreseeable," while the totality of the circumstances test examines past criminal acts, the "nature of the business, the condition of the premises, and the surrounding neighborhood." Beaver, *supra* note 130, at 109.

134 *See* J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law*, 81 VA. L. REV. 273, 305–06 (1995). This doctrine applies even though the employees' actions were beyond the scope of their employment. *See id.* at 305.

negligence: (1) the plaintiffs allege that the employer should have screened applicants more scrupulously and (2) plaintiffs attempt to advance some proof that the employer failed to respond to actual or constructive knowledge of the facts."[135]

B. Negligent Hiring and Retention

Claims of negligent hiring and negligent retention arise when an employer hires or retains an individual whose dangerous propensities, unfitness, or incompetence were known or should have been known to the employer, and this employee harms another person.[136] In a negligent hiring scenario, the employer is obligated to conduct a reasonable background check of the employee to satisfy its duty of care.[137] Further, after the hiring, an employer who learns of an employee's harmful proclivities has a duty to take precautions to protect others from the employee in order to avoid liability for negligent retention.[138] In both negligent hiring and negligent supervision cases, the plaintiff must also establish that there existed a foreseeable risk of injury because of these harmful proclivities.[139] Courts have proven to be flexible in determining whether an injury is foreseeable, though they have provided differing guidelines as to what constitutes a reasonable background search.[140]

Due to the enormous investment made in athletes and fear of negative media attention, professional sports teams conduct background checks of many of their prospective employees prior to the league's entry draft.[141] While some teams search more extensively than others, at a minimum, most teams research

---

[135] Beaver, *supra* note 130, at 109.

[136] *See* Verkerke, *supra* note 134.

[137] *See* Katrin U. Byford, Comment, *The Quest for the Honest Worker: A Proposal for Regulation of Integrity Testing*, 49 SMU L. REV. 329, 359 (1996).

[138] *See* Goldberg, *supra* note 124, at 215.

[139] *See id.* at 216.

[140] *See* Byford, *supra* note 137, at 359–60.

[141] *See* L.C. Johnson, *The NFL Takes a Hit; With Pending Legal Troubles of All-Pro Ray Lewis and Former Receiver Rae Carruth, as Well as the Arrests and Disturbing Cases of Other Players, Does the League Have a Problem with Off-the Field Violence That It Cannot Control?*, ORL. SENT. TRIB., Feb. 27, 2000, at C8 ("Before an athlete is allowed to strap on a pair of shoulder pads, buckle a chinstrap or make a fresh set of teeth marks on a mouthpiece in the National Football League, he must endure a battery of physical and psychological tests used to assess his overall health and state of mind.").

arrest and conviction records, check the references of, and administer screening tests to their potential top draft picks.[142] Despite the results, however, many teams ignore known dubious backgrounds, and instead hire athletes because of their substantial playing abilities.[143] If these athletes are subsequently involved in a hazing incident where another player is injured, the team will likely be liable for negligent hiring. Similarly, once employed, a team gaining actual or constructive knowledge of a player's harmful tendencies has a duty to protect their other employees from this individual. Thus, if an employee is subsequently hazed and injured at the hands of this individual, the team will likely be liable for negligent retention.[144] An example is the case involving Andre Royal, the only New Orleans Saints player to admit his involvement in the team's hazing. Royal was signed to a free agent contract by the team despite a checkered background that included four suspensions during his college career at Alabama and an incident involving a Bourbon Street dancer.[145] While it is unclear whether the Saints had conducted a background search or had actual knowledge of Royal's history when he was acquired,[146] it is reasonable to conclude that the team *should have been aware* of his background. If this constructive knowledge was present pre-employment, then the Saints could be liable for negligent hiring because a reasonable background check would have uncovered the information. If constructive knowledge was present post-employment, then the team could be

---

[142] NFL teams are most vigilant in doing so, subjecting most prospective draftees to a battery of psychological tests, interviews, and reference checks. *See id.*

[143] For example, Lawrence Phillips, a star football player at the University of Nebraska, was selected in the NFL Draft by the St. Louis Rams despite well-publicized run-ins with the law involving violent behavior. *See* Kevin Mannix, *The NFL; Time Has Come—Glenn's Arrest Should Be Final Straw for Pats,* BOST. HERALD, May 17, 2001, at O96.

[144] *See* Verkerke, *supra* note 134, at 306 (explaining that "notice liability" demands that "[e]mployers that learn of a tendency toward violence . . . must respond with appropriate precautions against further harm").

[145] *See* Lonnie White, *Sinners and Saints; It's Not Team's Play that Bothers Ditka, It's Off-the-Field Activity that Wears on Him,* L.A. TIMES, Nov. 15, 1998, at D1. Royal signed a four-year, $3.8 million contract earlier that year. *See id.* He was traded to the Indianapolis Colts shortly after his admission and never played a regular season game for the Saints. *See id.*

[146] Mike Ditka, then head coach of the New Orleans Saints, claimed to be unaware of Royal's past. *See id.*

liable for negligent retention because the Saints would have needed to protect their other employees from Royal, an individual with known violent tendencies.

C. *Negligent Supervision*

Closely related to a negligent retention claim is one for negligent supervision. Negligent supervision occurs when an employer's failure to properly train or supervise an employee leads to a foreseeable injury to another employee.[147] An employer with actual or constructive knowledge of an employee's harmful proclivities must properly supervise the situation so as to prevent any injuries from occurring.[148] Doing so is quite burdensome, however, because an employer that monitors its employees too closely raises privacy concerns that may negatively impact their employees' morale and consequently hamper productivity.[149] Supervising is even more difficult when a collective bargaining agreement exists restricting the ability of the employer to monitor and discipline employees.[150]

As previously mentioned, hazing of rookies has long been a fixture of professional team sports.[151] This tradition has also long been known by the management of professional sports teams yet it is ignored out of a fear of hurting the *esprit de corps*.[152] This general knowledge heightens the duty owed by any one team to supervise its employees because a court may hold the organization lacking actual knowledge liable based on its constructive knowledge of the hazing tradition. In the New Orleans Saints incident, the presence of an announcement of a planned hazing on a meeting room blackboard—whether or not it was seen and ignored by the assistant coaches, as alleged—is indicative of the extent to which hazing is accepted in professional sports. The players made little attempt to keep their hazing plan a secret; if hazing had been *verboten*, surely the players would have attempted to conceal it. The team has a duty to take affirmative steps to prevent hazing, particularly

---

147 *See* Boone, *supra* note 129, at 880.

148 *See* Verkerke, *supra* note 134, at 306.

149 *See* Beaver, *supra* note 130, at 120.

150 *Id.* at 122. Collective bargaining agreements are present in all four major North American professional sports leagues.

151 *See Men Behaving Badly*, *supra* note 1.

152 *See* Freeman, *supra* note 103.

during training camps when hazing incidents are prevalent. The placement of coaches in training camp residences and enforcement of a strict zero-tolerance policy with clearly enunciated consequences are two measures that all teams could take to reduce the risk of hazing.[153] Simply warning players about hazing without additional penalties or enforcement policies is not likely to absolve teams of liability. In the New Orleans Saints incident, the players ignored the head coach's two warnings about hazing, including one given just hours before the hazing occurred.[154] The impetus for this warning was a hazing incident on the final night of training camp of the prior year in which harm was done to the dormitory rather than to the rookies themselves.[155] Thus, it is likely that a court would have found the Saints to have actual or constructive knowledge of the planned hazing. Its failure to prevent the hazing therefore constituted a breach of its duty to its employees and the team would have been liable for its negligent supervision.

D. Voluntary Assumption of Duty to Protect

An organization that volunteers or contracts to protect others from a third party's harmful acts owes a duty of care under the theory of voluntary assumption.[156] The employer's implied or express promise to provide security measures at its facilities establishes a duty to protect its employees from third party criminal acts.[157] An employer that provides security must

---

[153] The consequences must not run afoul of the maximum penalties proscribed by each league's collective bargaining agreement, lest they be subjected to a grievance arbitration process.

[154] *See* Strom and Allee-Walsh, *supra* note 114.

[155] *See* Peter, *supra* note 87.

[156] *See* Linda A. Sharp, Annotation, *Employer's Liability to Employee or Agent for Injury or Death Resulting From Assault or Criminal Attack By Third Person,* 40 A.L.R. 5th 1, 32–35 (1996). This duty is as follows:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

RESTATEMENT (SECOND) OF TORTS § 324 A (1965).

[157] *See* Phillips, *supra* note 123, at 160.

do so in a manner that is sufficient to prevent any foreseeable crimes against its employees from occurring.[158] The foreseeability of this criminal activity is typically based on the existence of any prior similar incidents.[159]

In professional sports, the voluntary assumption theory is applicable in instances of hazing that occur either in the team's practice or locker room facilities or during residential training camps in which the team provides dormitory-style housing for all of the players. Security is either provided by the team itself or by a third party pursuant to a contract. This security must be adequate to protect the team employees from any foreseeable criminal acts including those associated with hazing incidents. If the team was on notice of any prior hazing incidents, a court may consider hazing a foreseeable act. Once deemed foreseeable, the occurrence of any hazing by employees, despite the provision of security by the team, would render the organization liable for breach of the voluntary assumption of duty.

IV. RECOMMENDATIONS AND CONCLUSION

Intercollegiate athletics and professional sports administrators and coaches must be diligent in monitoring the initiation activities of their athletes and must be cognizant of applicable institutional and organizational regulations as well as local, state, and national laws that govern hazing and group initiations. These sport administrators must be aggressive in investigating complaints by athletes and should stop initiation rites before they reach the level of criminal hazing. This can be achieved through development and enforcement of a clear, comprehensive anti-hazing policy.

Unfortunately, initiation rites are a traditional part of athletic team membership that will not likely disappear soon. There are, however, several ways that coaches and administrators can prevent initiations from becoming criminal hazing that endanger the innocence, and even the lives, of student-athletes. Respondents in the Alfred University study made three recommendations for the prevention of athletic hazing:

---

158 *See* Beaver, *supra* note 130, at 125.

159 *See id.*

(1) Send a Clear Anti-Hazing Message by developing a written anti-hazing policy; educating administrators, coaches, and athletes; developing a contract for athletes to sign; establishing a record of strong corrective action; and immediately notifying law enforcement of any suspected hazing incident.

(2) Promote Responsibility, Integrity, and Civility by involving high-level administrators, screening recruits for behavioral problems, establishing a recruitment visit policy, and making an athlete's behavior on and off the field part of the coach's evaluation.

(3) Offer Team-Building Initiation Rites by training coaches on the importance of initiation rites and the proper ways to conduct them, require organized initiation rites prior to each season, and incorporating initiations into team goal-setting.[160]

These recommendations are applicable to both intercollegiate and professional sports. In addition to these recommendations, it is particularly important for coaches to be educated about hazing and to be made aware of its warning signs. As individuals with the most contact with athletes, coaches must be especially vigilant of obvious, relatively benign behaviors that may indicate that more serious hazing is occurring.[161] Institutions and organizations may also adopt proactive practices to prevent hazing such as having supervision in locker rooms and player living facilities during residential training sessions where many hazing incidents occur.[162] Athletes should be encouraged to notify the appropriate internal officials of any hazing by designing an anonymous reporting system. Athletes might prove more willing to disclose the hazing if they can avoid the negative consequences associated with doing so.[163]

If a hazing incident is reported, officials should immediately

---

[160] *See NCAA Hazing Study*, *supra* note 2.

[161] *See* Kevin Bushweller, *Brutal Rituals, Dangerous Rites*, AM. SCH. BD. J., *at* http://www.asbj.com/2000/08/0800coverstory.html (Aug. 2000).

[162] *Id.*

[163] *See* Michael I. Levin, *Hazing—Debunking the Myths About This "Right" of Passage*, PA. SCH. BOARDS ASS'N BULL., *at* http://www.nsba.org/nepn/newsletter/500.htm (Oct. 1999); Kelley R. Taylor, *Hazing: Harmless Horseplay?*, PRINCIPAL LEADERSHIP, March 2001, at 78.

conduct a fair investigation[164] and take prompt, strong remedial action to punish those involved and ensure that the behavior is stopped.[165] In the context of professional sports, the league office and players association should be notified so that they, too, may take appropriate action in the form of investigations, fines, or suspensions. If appropriate, the activity should be referred to law enforcement officials.[166] A subsequent discovery of any criminal activity by law enforcement officials should be followed by vigorous prosecution of the perpetrators.[167]

It is clear that hazing is widespread, harmful, and misunderstood.[168] The pervasiveness of hazing in intercollegiate sports should be cause for concern to athletic administrators throughout the NCAA. This deeply ingrained behavior continues when athletes reach the professional leagues, though it is somewhat surprising due to the tremendous amount of money that professional teams have invested in their athletes. Clearly, however, until these policy recommendations are adopted, these senseless initiation rites will continue unabated, and more educational institutions and professional sports organizations will be subjected to liability.

---

[164] *See* Levin, *supra* note 163.

[165] *See* Bushweller, *supra* note 161; Levin, *supra* note 163.

[166] *See* Bushweller, *supra* note 161; Levin, *supra* note 163.

[167] *See* David S. Doty, *No More Hazing: Eradication Through Law and Education,* UTAH B. J., Nov. 1997, at 18, 19, *microformed on* Hein's Bar J. Serv. (William S. Hein & Co., Inc.).

[168] *See* Levin, *supra* note 163.