Fall 2011

Hazing on College Campuses: Who Is Liable?

Elizabeth Marcuccio
emarcuccio@siena.edu

Joseph P. McCollum

Follow this and additional works at: http://digitalcommons.fairfield.edu/nealsb

Recommended Citation
Available at: http://digitalcommons.fairfield.edu/nealsb/vol26/iss1/2

This Article is brought to you for free and open access by DigitalCommons@Fairfield. It has been accepted for inclusion in North East Journal of Legal Studies by an authorized administrator of DigitalCommons@Fairfield. For more information, please contact digitalcommons@fairfield.edu.
HAZING ON COLLEGE CAMPUSES: WHO IS LIABLE?

by
Elizabeth A. Marcuccio*
Joseph P. McCollum**

I. INTRODUCTION

An individual has the right to be free from harmful or offensive contact by another, including intentional contact anticipated to cause physical harm and emotional distress. The common law recognizes this right to be free from unpermitted contact, as well as the corresponding duty to conduct oneself in a manner that prevents unreasonable risks to others. When dealing with hazing on college campuses, the law differs from state to state. Currently forty-four states have anti-hazing statutes.1 These statutes play an important role in setting forth the proper public policy on this issue.

In the past hazing was seen as a legitimate rite of passage, and young people who succumbed to the pressures of classmates where believed to be getting what they deserved. Now, in addition to civil liability, wrongdoers are facing criminal prosecution for their actions.2

II. ANTI-HAZING STATUTES

Typically state statutes that outlaw hazing prohibit any willful act that recklessly or intentionally endangers the physical health of a student. Only Alabama, Ohio, Oklahoma, and Rhode Island recognize the mental as well as the physical aspects of hazing (see Figure 1).3 Although a particular state may not have enacted a hazing statute, often actions that constitute hazing may be prosecuted under other criminal statutes, such as the state’s assault or reckless endangerment laws. In most states, hazing is considered a misdemeanor, with fines ranging from $100 to $5,000.4 However, in Illinois, Indiana, Missouri, Texas, Virginia, and Wisconsin, hazing that results in death or “great bodily harm” is categorized as a felony (see Figure 2).5 The New Hampshire law is also particularly aggressive, stating that in addition to the individual wrongdoers, institutions may also be charged with a misdemeanor for “knowingly condoning hazing or negligently failing to take adequate measures to prevent student hazing”.6

<table>
<thead>
<tr>
<th>Figure 1: Hazing Statutes</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Type</strong></td>
</tr>
<tr>
<td>Physical Hazing Only</td>
</tr>
<tr>
<td>Mental and Physical Hazing</td>
</tr>
<tr>
<td>None</td>
</tr>
</tbody>
</table>
Many state statutes contain stipulations outlining stiff punishment for those aiding or assisting in hazing activities. It is evident that lawmakers acknowledge the significance of the peer pressure and coercion components of hazing. In the vast majority of states, criminal statutes include a provision that bars the wrongdoers from defending their conduct on the basis of the alleged consent by the pledge or new member to the hazing activities.

III. CIVIL LIABILITY

In addition to criminal sanctions, wrongdoers face civil liability. Unlike the criminal courts, most civil courts allow those involved in hazing activities to defend their actions based on the plaintiff’s purported consent, and courts are holding hazed students responsible for decisions made with informed consent. This issue, however, is more complex than it seems. Often hazing involves circumstances where the victim never truly consents to the hazing or where the consent is obtained by the forced consumption of alcohol, threats, or extreme group pressure. Ultimately, many of these students withhold their consent to hazing, but only after they have suffered serious harm.

When injury or death occurs as a result of hazing there is no question that the individual parties involved in the incident are subject to liability. Many lawsuits also focus on the fact that the fraternity or university did not take sufficient action to protect the injured party. Whether these institutions can also be sued depends on the specific facts of the case.

IV. THE FRATERNITY

The national fraternity is often the hardest to reach in a lawsuit. Many fraternities are set up to shield the national organization from liability arising out of the misconduct of its members and local chapters. They are frequently formed as unincorporated associations. This is a unique legal form that is not required to be registered with the state. In a further attempt to avoid litigation, the national organizations often structure their corporate documents to “affirmatively disavow any obligation to supervise or control conduct of chapters or members.” These corporate documents establish the national fraternity as merely a clearinghouse for information and ideas, as well as a general resource for local chapters. The documents further indicate that the national fraternity will have no responsibility for certain types of misconduct by the chapter or its members, including hazing.

Even when a fraternity is established using this type of structure, the national fraternity can still be liable if it is found to supervise and have a measure of control over its local chapters. For example, many of the national organizations hire "leadership consultants" who are former members of the fraternity that have recently graduated. These individuals are responsible for traveling to universities to make sure individual chapters are following the laws and rules, and to provide training in alcohol and related matters. They often have the power to take away the chapter's charter if rules are not being
obeyed.\textsuperscript{11} This indicates that, despite what the corporate documents say, the national fraternity oversees and manages its local chapters. What if the contact between the national and local entities is minimal? The national organization may have contact with a local chapter only two times per year, and could have 300 to 400 chapters at various universities nationwide. Does the national fraternity have sufficient control over the local chapters to be held liable?

Under common law agency principles it is the degree of control that the national fraternity has over the local chapters that determines whether the national fraternity can be sued. Defense attorneys will argue that the national fraternity has no intent to control the day-to-day activities of a local chapter. They merely give the local fraternity a license to use their name and symbol, and offer some guidelines. Nevertheless if the national fraternity is in the position to change the behavior of its members, a plaintiff can sue the national fraternity, and win.\textsuperscript{12} In many cases there is no such thing as membership solely in the local chapter. Also the chapter pays dues to the national fraternity. Therefore members carrying out initiation activities at the local level are doing so under the authority of the national fraternity and directly for its benefit. Through the authority conveyed upon the chapter by the fraternity's organizational documents, the national organization has, in fact, established the membership intake process. Therefore it has the authority to either modify the process or prevent the conducting of initiations altogether.\textsuperscript{13}

Most fraternities have strong anti-hazing and anti-underage drinking policies that stem from the national organization. These policies are detailed in manuals, and representatives from the fraternity go to various college campuses to give talks about these issues. By establishing these policies the national fraternity is attempting to exercise control over the chapters. However, it can be argued that this is not enough to render the national fraternity liable. The policy statements can be seen as nothing more than the fraternity's mission statement, especially if there is no penalty attached for violating the policy.\textsuperscript{14}

V. THE UNIVERSITY

Universities may also face liability for student injury or death as a result of hazing. Historically, colleges and universities were looked upon as "parental supervisors", and courts did not question the authority of universities over their students.\textsuperscript{15} This line of reasoning, the \textit{in loco parentis} doctrine, saw its demise with the Third Circuit's ruling in \textit{Bradshaw v. Rawlings}.\textsuperscript{16} In \textit{Bradshaw v. Rawlings} two students attended a picnic sponsored by the school at which alcohol was served. Rawlings became intoxicated. While driving back to campus Rawlings lost control of his car and struck a parked vehicle. Bradshaw, a passenger in Rawlings' car, was rendered a quadriplegic. Bradshaw later sued the college, among others, claiming that it had breached its duty to protect him from unreasonable risk of harm.\textsuperscript{17} The Third Circuit determined that since the students were no longer minors, there was no special relationship existing between the college and the students. Therefore the college had no duty to control a student's conduct to prevent him from harming another.\textsuperscript{18}

The \textit{Bradshaw} decision clearly establishes a "no-duty" model, allowing courts to conclude that a "custodial, supervisory relationship between a university and its students [is] inconsistent with modern educational objectives."\textsuperscript{19} \textit{Rabel v. Illinois Wesleyan University}\textsuperscript{20} is another example of this "no duty" movement.
In Rabel a student, Cherie Rabel, suffered a skull fracture and concussion after being forcibly grabbed, picked up, and accidentally dropped on the ground by a member of Phi Gamma Delta fraternity. Rabel filed a complaint against the university claiming, in part, that the university’s “policies, regulations, and handbook created a special relationship with its students and a corresponding duty to protect its students against the alleged misconduct of a fellow student.”

In its decision the Appellate Court stated:

….. we do not believe that the university, by its handbook, regulations, or policies voluntarily assumed or placed itself in a custodial relationship with its students, for purposes of imposing a duty to protect its students from the injury occasioned here. The university’s responsibility to its students, as an institution of higher education, is to properly educate them. 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.

After the Bradshaw and Rabel decisions, courts were unlikely to hold universities legally responsible for the actions and injuries of their students. However subsequent case law established that, under certain circumstances, universities assume a duty of care.

In Furek v. University of Delaware the court demonstrated that it was willing to depart from the strict “no duty” standard and impose liability on universities under certain factual circumstances. In Furek a fraternity pledge suffered first- and second-degree burns after a fraternity member poured oven cleaner over his head and back as part of Hell night high jinks. Attendance at the secret Hell night ceremony was mandatory for pledges in order to be accepted into the Sigma Phi Epsilon fraternity. The events took place in the chapter house, which was leased from the University of Delaware by the fraternity. The university had an established policy prohibiting hazing.

The Delaware Supreme Court determined that the university’s effort to regulate hazing exposed it to liability for hazing-related injuries. The university not only had a duty to protect its students from the dangers of hazing, it had an obligation to exercise appropriate restraint over the conduct of fraternity members. Even though the university did not control the day-to-day activities of the chapter, it had an obligation to promote general campus safety and security. Recent case law indicates that the Bradshaw line of reasoning is still a frequent and justifiable defense, but the Furek decision is a landmark example of how the “no duty” principle is not applicable in every situation, particularly when hazing-related injuries are involved.

The Furek decision has left colleges and universities in a dilemma. If they exercise strict control over fraternities they have an implied duty of care that can expose them to liability if breached. Conversely, exercising no control is not the answer. Many states now have laws that require universities to adopt anti-hazing policies, and failure to do so can result in liability.

VI. STATISTICAL ANALYSIS

In our statistical analysis we studied 43 colleges in New York State that have Greek Life on campus and 41 colleges that do not have Greek Life. Our data was retrieved from the websites “mynexcollege.com” and “collegeprowler.com”. Our goal was to determine what factors may influence the
absence or presence of Greek Life. The first factors studied were geographical location of the college, the cost of going to that college, and average undergraduate size for the college. As Figure 3 clearly indicates, only undergraduate size differs significantly. College campuses with Greek Life have an average undergraduate population approximately 2.25 times larger than colleges without Greek Life.

<table>
<thead>
<tr>
<th>Figure 3: Comparing Campus Life in New York Colleges</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number in Suburban Areas</td>
</tr>
<tr>
<td>Number in Rural Areas</td>
</tr>
<tr>
<td>Number in Urban Areas</td>
</tr>
<tr>
<td>Ave Cost of Tuition</td>
</tr>
<tr>
<td>Ave Cost of Room and Board</td>
</tr>
<tr>
<td>Ave Undergraduate Size</td>
</tr>
<tr>
<td>Ave Percent of On Campus Housing</td>
</tr>
</tbody>
</table>

The reason it appears that Greek Life prevails on larger campuses is because 21% of colleges with Greek Life have undergraduate populations in excess of 10,000 students, and 71% of colleges without Greek Life have less than 3,000 students. However Greek Life exists on both large and small college campuses. For example Hartwick College, one of the smallest colleges, (under 2,000 students) and New York University, one of the largest colleges, (over 20,000 students) both have Greek Life.

Next, we determined how many males and females participated in Greek Life and found the average number of Fraternities and Sororities on college campuses (See Figure 4).

<table>
<thead>
<tr>
<th>Figure 4: Facts About Greek Life in New York Colleges</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ave. Percentage of Males in Fraternities</td>
</tr>
<tr>
<td>Ave. Percentage of Females in Sororities</td>
</tr>
<tr>
<td>Ave. Number of Fraternities on Campus</td>
</tr>
<tr>
<td>Ave. Number of Sororities on Campus</td>
</tr>
</tbody>
</table>

Roughly 15% of students on college campuses participate in Greek Life. Since the average undergraduate size is 6,374 students, approximately 956 students on a typical New York campus belong to a Greek Organization. Therefore each Fraternity or Sorority on campus has approximately 53 members.

<table>
<thead>
<tr>
<th>Figure 5: Type of Governance for Greek Life</th>
</tr>
</thead>
<tbody>
<tr>
<td>Type of Council</td>
</tr>
<tr>
<td>Dean of Greek Life</td>
</tr>
<tr>
<td>Panhellenie Council</td>
</tr>
<tr>
<td>Interfraternity Council</td>
</tr>
<tr>
<td>Greek Council</td>
</tr>
<tr>
<td>Other</td>
</tr>
</tbody>
</table>

It was important to our study to determine whether New York colleges with Greek Life have a Dean or Director of
Greek Life, and whether any governance councils exist on these New York campuses. Figure 5 above summarizes the type of governance that colleges have in place.

The following definitions are helpful in understanding Figure 5:

The Interfraternity Council (IFC) is a council formed by members of all the fraternities on campus. The IFC, as defined by Cornell University, is a "form of common governing council, in which the member chapters collectively assemble and discuss issues affecting the Fraternity and Greek System as a whole". 27 The Cornell website goes on to mention that "The council's primary concern is the safety, security, and advancement of each member fraternity house". 28

The Panhellenic Council is a council formed by members of all the sororities on campus. The Panhellenic Council, as defined by Columbia University, is "an umbrella organization to promote mutual collaboration among individual chapters of the Greek system". 29 The Columbia University website further states: "in order to achieve its goals [the association] implements programming that foster the universal sorority ideals of leadership, integrity, and scholarship among its members". 30

Figure 5 makes it clear that colleges are putting safeguards in place to govern Greek Life. Over 88% of New York colleges that have Greek Life also have a Dean to oversee their Greek organizations. It appears that these colleges have assumed a duty of care for their students. Nevertheless, eleven deaths have occurred due to some type of hazing on nine New York campuses since 1970. 31 In other words, approximately 21% of the colleges in New York State that have Greek Life have had a death due to hazing. The most recent were Kevin Lawless at Iona in 1999, Jonathan Marconi at SUNY Cortland in 2001, Ben Klein at Alfred University in 2002, Jerry Hopkins at Rochester Institute of Technology in 2003, Walter Dean Jennings at SUNY Plattsburgh in 2003, and Arman Partamian at SUNY Geneseo in 2009.

It should be noted that the deaths of Walter Jennings, Arman Partamian, and Jonathan Marconi were all associated with unrecognized Greek Organizations. These deaths, along with injuries suffered by Bryan Parslow at SUNY Brockport in 2009, have prompted some colleges to list unrecognized Greek Organizations on their college website and warn that they will not support a student's choice in joining these organizations. The University at Buffalo's website states: "The University at Buffalo does not advise nor control the actions of these off-campus groups. Typically, the instances of hazing are high for these groups as well. Affiliation with these groups is a violation of the UB Student Code of Conduct and puts students at risk for suspension and/or expulsion from the University. University policy.....in accordance with SUNY policy changes mandates a permanent transcript notation for students who are found to be responsible for hazing incidents that involve the injury of another person." 32

It is clear that the SUNY college system is taking a stand against unrecognized chapters. The website of SUNY Oneonta goes into detail of what it is like to be a member of one of these organizations and the effects it has on the community. It states: "Being a member of an unrecognized Greek organization is likely to be an unrewarding experience, regardless of what they may tell the student. Many of these organizations pledge until very close to the end of the semester and then their dues go towards parties, shirts, and alcohol. This is where the phrase 'You pay for your friends' comes from in regards to joining a Greek organization because the dues
money is going towards nothing productive to society. These organizations are just social groups. Unrecognized organizations give a bad reputation to all Greek organizations in the city of Oneonta, which makes it harder for recognized organizations to keep their reputations positive. Unrecognized organizations are often a nuisance to society: causing fights, large amounts of noise ordinance violations, unpleasant living environments, destruction to off-campus housing, etc. Unrecognized fraternities are banned from living in many apartments, which is stated in many leases, along with fraternity and sorority hazing activities. Landlords are aware of the problem but there is only so much they can do.33

What can colleges do in addition to making students aware of the risks of joining these organizations? Alfred University, after the death of a pledge in 2002, started an investigation into the hazing practices of the Greek Organizations on its campus. This investigation resulted in the trustees of the university eliminating all Greek Life on campus. In a similar manner Ithaca College banned all Greek Life in the 1980’s due to a hazing incident. However, banning Greek Life from campus will not entirely solve the problem of hazing, since unrecognized fraternities will continue to exist.

VII. CONCLUSION

Fraternity hazing has resulted in at least one death every year since 1970.34 Yet the practice continues despite the deaths, the enactment of anti-hazing statutes and the increasing number of lawsuits. The states’ adoption of anti-hazing legislation reflects the shift in society’s view of hazing. While legislation has improved greatly during the last decade to combat hazing, it is evident that more progress needs to be made. The mental as well as physical aspects of hazing should be recognized, and heavier punishments must be imposed for hazing offenses.

In civil lawsuits plaintiffs frequently use a negligence theory to recover for hazing-related injuries. When suing the national fraternity or university, the focal point of the litigation is whether a duty of care exists. In seeking to establish a duty, students will typically claim that fraternities and universities assume a duty when they attempt to regulate or control chapter conduct or activities. This puts the organizations in the awkward position of deciding whether to limit their liability by exercising very strict control, or by exercising no control whatsoever.

END NOTES

2 Id.
3 http://www.thegreekshop.com/hazing.html
5 http://www.thegreekshop.com/hazing.html
6 Id.
7 Id.
10 Id. at 2.
11 Id. at 4.
12 Id. at 3.
13 Id. at 4.
14 Id.
16 Bradshaw v. Rawlings, 612 F.2d 135 (3rd Cir. 1979).
17 Id. at 136.
18 Id. at 143.
21 Id. at 356.
22 Id. at 361.
24 Id. at 508.
25 Id. at 514.
27 http://cornellifc.com/about-the-ifc/
28 Id.
29 http://www.columbia.edu/cu/panhel/aboutus.htm
30 Id.
31 http://hazing.hanknuwer.com/
32 http://www.student-affairs.buffalo.edu/greeklife/grigc.php
33 http://www.oneonta.edu/development/huntunion/igc/recunrec.html