

RISK REDUCTION AND FRATERNAL ORGANIZATIONS: TORT LIABILITY, LEGISLATION, AND SUGGESTIONS FOR PRACTICE

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Tort liability claims against colleges and universities in response to student-related injuries and deaths compel administrators to develop a complete understanding of the university-student relationship so that they may actively engage in risk reduction strategies. With several states enacting anti-hazing, alcohol, and risk management education legislation, universities have been driven to develop and implement strategies that address risk management concerns associated with fraternities, sororities, and other student organizations to support core institutional mission and values. In this manuscript the author reviews the emergence of tort liability on college and university campuses, critiques recent risk management legislation, provides examples and suggestions for crafting risk management policies and developing educational programming for fraternities, sororities, and other student organizations, and outlines recommendations for practice.

Introduction

Each year, colleges and universities experience numerous incidents involving the injury and/or death of students. Frequently, these incidents are the result of behaviors by members of student organizations, many affiliated with fraternities and sororities. According to Scott-Sheldon, K. Carey, and M. Carey (2008, p.62), membership in student organizations “may increase a student’s risk” due to organizational rituals and risky behaviors. Whether because of binge drinking, hazing incidents, or poor organizational management, student organizations, instead of being viewed as extracurricular aspects of the collegiate experience, can be viewed as active facilitators of risky behavior.

According to the 2008 National Survey of Student Hazing, approximately 55% of respondents claimed to experience hazing when joining a student organization or club, with members of athletic teams and social fraternal organizations being most likely to experience hazing (Allen & Madden, 2008). Hazing, whether physically, mentally, or emotionally inflicted, remains a prevalent issue on campuses today.

Hazing, however, is only one of the major risk management issues being addressed by postsecondary institutions. Underage consumption of alcohol and binge drinking are often the cause of accidents and injuries. Alcohol abuse among college students results in approximately 1,700 deaths, 500,000 unintentional injuries, and 600,000 assaults annually (NIAAA Report, 2007). What is more disturbing, however, is the junction of the two actions, hazing and binge drinking. Researchers have reported that a majority of hazing-related accidents are alcohol related, with fraternity or sorority membership serving as a primary predictor (Allan & Madden, 2008; Langford, 2008; and Riordan & Dana, 1998).

In light of annual instances of student injury as a result of risk-related behaviors on college and university campuses, programs and policies should be implemented to mitigate liability and minimize risky behaviors. In this manuscript the author reviews the emergence of tort liability on

college campuses, critiques recent risk management legislation, and provides examples and suggestions for practice with regard to crafting risk management policies and developing educational programming in fraternal organizations.

History

From In Loco Parentis to the Emergence of Tort Liability

Tort liability is defined as “a civil wrong, other than breach of contract, for which courts will allow a damage remedy,” and is generally applied to higher education institutions in cases of negligence (Kaplin & Lee, 2007, p. 87). Due to repeated incidents and the need to address tort liability issues, university administrators have reevaluated their roles in managing and reducing risk. In response to litigation and the application of tort law toward postsecondary institutions, administrators are now engaged in reducing risk on and off campus through various policy and educational initiatives.

Prior to the 1960s, colleges and universities found shelter in the *in loco parentis* doctrine. *In loco parentis* in American higher education can be traced back to *Gott v. Berea College* (1913) and *Stetson University v. Hunt* (1925), which gave, then affirmed “rights and powers over students” (Bickel & Lake, 1999, p. 21-23) to institutions. The courts ruled in *Gott v. Berea College* (1913) that in acting *in loco parentis*, the college could prescribe requirements for admission and standards of conduct and thus had the authority to issue rule. Similarly held in *Stetson University v. Hunt* (1925), the courts ruled that in vesting the authority to enforce discipline, the president stood *in loco parentis* to his students. Scholars have noted, however, the doctrine was used more prevalently in the 1950s, when universities enjoyed a period of “insularity from legal scrutiny,” and thus were enabled to discipline students without a fear of litigation (Bickel & Lake, 1999, p. 18).

Decisions in *Bradshaw v. Rawlings* (1979) and *Dixon v. the Alabama State Board of Education* (1961) questioned whether colleges and universities were subject to tort liabilities for student-initiated actions or injuries and the extent to which universities had to provide students with their constitutional rights. For example, in *Dixon v. the Alabama State Board of Education* (1961), the Fifth Circuit held that a public institution could not expel students without at least minimal due process, thus outlining institutional duty to uphold constitutional rights. In the midst of the student protest movements of the 1960s and 1970s, *Dixon* transformed the university-student relationship from the paternalistic *in loco parentis* doctrine to a more contractually driven consumer/service relationship. *Dixon* dispelled the concept that public colleges and universities could enact disciplinary rulings without providing students with their basic constitutional rights, such as due process (Beckham, Melear, & Pearson, 2007). Furthermore, *Dixon* is now applied when students attending public institutions “possess an entitlement to receive certain services from higher education institutions” (Melear, 2003, p. 178). A new standard or duty was applied by the courts with the decline of the *in loco parentis* era. Entitled the “bystander era,” courts used case law to reinsulate colleges and universities as mere “bystanders” and thus they “had no legal duties to students” and could not be held liable for harm (Bickel & Lake, 1999, p. 49).

Since the 1980s, courts have begun to move away from the bystander era and enforce principles utilized in corporate law, and are more likely to apply “traditional negligence and duty rules to

university life” (Bickel & Lake, 1999, p. 105). Stemming from these actions is a sense of shared responsibility between universities and their students. Universities must enact policies and conduct procedures that adjudicate student behaviors through the lens of duty. Whether through implementing policies to curb binge drinking, maintaining university facilities, providing adequate campus security, or monitoring campus activities, colleges and universities must be able to provide reasonable care for students.

One of the more notable cases that has brought the “duty era” of tort law is *Furek v. the University of Delaware* (1991). In *Furek*, the court determined that the university’s own policy against hazing and its repeated warnings against the hazards of hazing constituted an assumed duty. In a reverse judgment based upon Section 314A of the Restatement (Second) of Torts, the court ruled that the University of Delaware’s persuasive regulation of hazing precipitated a reasonable expectation to protect students, thus creating duty (*Furek v. the University of Delaware*, 1991). Other scholars have found that through a review of university-student relations, the courts ruled that such a relationship is more than educational and that “institutions are not free from all obligations to protect their students” (Beckham, Melear, & Pearson, 2007, p. 195). Not only do universities hold a duty to protect students from potential dangers, like off campus visitors, or curbing alcohol or hazing issues, but students also have a reasonable duty of protecting themselves. For example, in *Regents of the University of California v. Roettgen* (1996), a student was killed while participating in a rock climbing class. The court ruled that a special duty of care was not present, because the university met the burden of establishing that Roettgen was not exposed to risk exceeding that of similar activities, and thus granted summary judgment (*Regents of the University of California v. Roettgen*, 1996). The courts used the reasoning that the student had responsibility for his/her own safety as well as the university had the responsibility of being aware of any non-ordinary risks (Bickel & Lake, 1999).

Courts, however, remain hesitant to find universities liable in some alcohol-related incidents, as *University of Denver v. Whitlock* (1987) illustrates. In *Whitlock*, the court concluded that the university did not owe a duty of care to Whitlock, despite his injury occurring on university owned property. Thus, even though universities must provide reasonable care, the university-student relationship with regard to negligent liability is still taking shape. As presented in the next section, state legislation, as well as university policies and initiatives, must be implemented in order to reduce risk and educate students on potential campus dangers.

Recent Legislation and Policy

Legislative Action

Over the past several years state legislators implemented legislation to address risky behavior on college and university campuses. One such issue that higher education administrators have struggled to curb over the past several years is hazing. According to StopHazing.org (2005), an online resource regarded as a leader in anti-hazing education, forty-four states have established anti-hazing laws, in some form or fashion, with Alaska, Hawaii, Montana, New Mexico, South Dakota, and Wyoming yet to adopt such laws. Many states attempt to define hazing and set adequate consequences for both individual and group offenders while outlining their respective legislation. Even though state laws are being readily enforced through potential fines and jail sentences, there is a concern about the uniformity of laws among states. While some states, such

as New York, classify hazing as a felony, others, such as Mississippi and Texas only punish the act as a misdemeanor (Hollman, B., 2002; StopHazing.org, 2005).

Inconsistencies are found in how states and institutions define hazing. Many such definitions tend to be very complex and confusing due to attempts to include as many hazing acts as possible. Other institutions rely on expert definitions, such as the one provided by the Fraternal Information and Programming Group (FIPG), which is considered the leading resource for risk management education, programming, and information, that may or may not be consistent with other university policies. Colleges and universities must adhere to the legislation implemented by their respective states. Anti-hazing strategies and policies must be consistent with the institution's overall mission and be thoroughly enforced (FIPG, 2009; StopHazing.org, 2005).

University Action

Along with hazing, alcohol abuse is an issue that affects almost all colleges and universities. Many have enacted institution-specific policies in hopes of curbing risky behaviors. One example is the University of Mississippi's Two-Strike Policy, which thoroughly outlines the parameters of on- and off-campus drinking, as well as mandatory consequences for breaking such standards (The University of Mississippi, 2009). In its third year of implementation, the University of Mississippi's Two-Strike Policy is being evaluated to determine its overall effectiveness. National and international fraternal organizations have also enacted policies in hopes of reducing alcohol risks associated with the fraternities and sororities they govern (FIPG, 2009; Phi Delta Theta Fraternity, 2007).

Many organizations follow policies and guidelines articulated by FIPG, which advise the use of third-party vendors, alcohol-free recruitment events, and the prohibition of open parties (FIPG, 2009). For example, Phi Delta Theta Fraternity has implemented alcohol-free chapter houses in pursuit of addressing alcohol-related liabilities as well as reducing costs related to facility repairs (Phi Delta Theta Fraternity, 2007). Since the implementation of the alcohol-free housing policy in 2000, claims against the fraternity have dropped significantly, with twenty-one claims in 1993 down to zero claims reported in the 2004-2005 calendar year (Phi Delta Theta Fraternity, 2007).

Policy Initiatives

Along with institutional and organizational policy guidelines relative to alcohol abuse, one national initiative, the *Amethyst Initiative*, has debated the effectiveness of the current legal drinking age. In the *Amethyst Initiative*, university chancellors and presidents from across the United States have produced a statement showing the negative drinking culture associated with the current minimum drinking age of 21. Self-admittedly not an attempt to lower the drinking age, the *Amethyst Initiative* hopes to draw the attention of elected officials and have them consider the consequences of current alcohol policies (Amethyst Initiative.org/About, 2009). Although this initiative has drawn support from 135 university leaders, the *Amethyst Initiative* has not garnered support from some key community agencies, such as Mothers Against Drunk Driving, whose leaders claim university administrators have "waved the white flag on underage and binge drinking policies" (Fain, 2008, A4).

In a more preventative approach to risk management on college and university campuses, the State of Texas enacted legislation in 2007 that requires postsecondary institutions to facilitate

risk management training with its student organizations. Under the Texas House Bill 2639 (2007, Section 1.2e), student organizational leaders such as officers, advisors, and pledges must attend, with all members annually attending a session while enrolled at a college or university. H.B. 2639 (2007) also called for the Texas Department of Insurance to perform a review of the levels and types of insurance coverage fraternities and sororities carry as supplied by their respective inter/national organizations. This report was due to the Texas State Legislature in January 2009, and is currently under review. According to the legislation, postsecondary institutions must provide risk management training once per year, no later than 30 days after the start of the fall semester, and cover topics including the

possession and use of alcoholic beverages and illegal drugs, as well as penalties imposed; hazing; sexual abuse and harassment; fire and other safety issues, including the possession and use of a firearm, weapon or explosive device; conduct of parties and other events; and adoption of a risk management policy (H.B. 2639, Section 1.2).

The legislation was passed in response to the death of a Texas Tech University student, Clay Warren. The author of the House Bill, Representative John Smithee, contended that perennial training could prevent further tragedies (Edwards, 2008). According to Edwards, Warren was a freshman at Texas Tech University (TTU) and while traveling home from a fraternity-sponsored event died from severe injuries sustained from a car accident. Warren's death was not the only incident that influenced the Texas lawmaker to take action. Another such tragedy took place at the University of Texas, Austin. Tyler Cross's death was a result of new member activities that included long periods of sleep deprivation and forced over-consumption of alcohol (Chapman, 2008). Initially, the court rendered a \$16.2 million settlement to the family of the student. However, the default settlement has since been overturned and the case is awaiting trial.

Although the Texas legislation was designed and implemented to assist in the prevention of the death or injury of students due to alcohol or hazing, there are some elements within the bill that should be addressed to improve its efficiency. First, the bill does not outline guidelines or a model for institutions to follow with regard to their respective risk management training. Depending on the respective funding of the various postsecondary institutions within the state, some programs may be more adequately developed to address risk management issues. The state should possibly consider creating a task force to develop program guidelines that go beyond suggested topics and provide resources to utilize in training students. Second, the bill calls for the development and adoption of a risk management policy. However, it does not mention if such policy is created by each institution or is a consistent policy adopted collectively by the institutions in the state. Referring back to anti-hazing laws and alcohol policies, providing guidelines for risk management policies, which would be consistent with other state legislation, may be an efficient way to ensure compliance. Third, depending on the recommendations provided within the Texas Department of Insurance's study, questions may arise with regard to current fraternity and sorority insurance policies.

Finally, even though House Bill 2639 primarily mandates risk management education, the bill does not outline any assessment or evaluation requirements to ensure that the risk management training provided by the postsecondary institutions within the state is effectively addressing the issue.

Based on the review of research pertaining to mitigation of risk-related behavior, current state and university risk management policies, the Texas risk management legislation, and organizational initiatives, the following appear to be the most substantiated practices in crafting institutional risk management policy and creating educational initiatives.

Best Practices for College Risk Management Policies and Education

In order to prevent risky activities and reduce liability concerns, institutions and student organizations should take proactive steps in the area of risk management policies and education. For colleges and universities to be successful, institutional policies must be collaboratively formed and clearly communicated. In addition, institutions should provide educational programming that emphasizes prevention-based programming. The following are guidelines for policy development, risk management programs, and best practices for successful initiatives.

Policy Development

Colleges and universities should adopt a risk management model in which “students are involved in solutions to alcohol risks and policy making with regards to the problems” (Bickel & Lake, 1999, p. 192-193). Under this model, universities must operate in collaboration with students and student organizations to define risky behaviors, develop consistent and concise policies, and set appropriate consequences for such policies. University administrators must employ students in identifying issues that challenge the campus community, whether that is hazing, alcohol/drug abuse, organizational traveling, proper social event procedures, or adequate liability insurance coverage. Once the salient issues are identified, collaborative discussions must take place to define the issue, such as clearly defining hazing, locate the cause of the problem, such as traditions or campus culture, and set goals and solutions to adequately address the issue, not just punish the offenders. Through this collaborative, proactive model for implementing institutional policy, institutions are better poised to garner participation when striving to educate student organizations on the newly-created policies and associated risks.

Risk Management Education

Providing risk management education to student organization members is important for colleges and universities motivated to reduce risky behavior and unfortunate accidents on campus. Institutions, such as Texas Tech University (TTU) and the University of Florida, have begun offering mandatory training sessions for fraternities and sororities, as well as other student organizations. The state of Texas requires its higher education institutions to provide such training, and Texas Tech University provides a sound example of how an educational program of this magnitude should take place. In the wake of the death of Clay R. Warren, the Office of Greek Life, under the supervision of the TTU Center for Campus Life, created the Clay R. Warren Risk Management Retreat. Through a series of large and small group sessions, the retreat utilizes on-campus professionals, as well as professional facilitators, to discuss issues on alcohol and drug use, sexual abuse and harassment, hazing, travel, and strategies for prevention (Texas Tech University, 2009). According to James Urban, a fraternity/sorority professional at TTU, since the Clay R. Warren Risk Management Retreat is offered once a semester, it “provides the foundation for chapters to be more successful in regards to risk management” and by providing a program of this nature, chapters benefit by being “given the opportunity to talk about and reflect upon risk management” (J. Urban, personal communication, January 28, 2009).

Another notable program is the University of Florida Social/Risk Management Training (2009). Along with providing engaging discussions on risk management issues universities face, such as hazing and alcohol abuse, it also includes several other unique sections. First, instead of simply reviewing campus policies and their corresponding forms, the training provides an in-depth examination of the purpose of those policies and how and why they were formed and implemented. Second, unlike most educational programs, the Social/Risk Management Training provides a purpose for the training by reviewing why the program is being held along with defining risk management and the different types of risk, thus providing meaning to the program and increasing the buy-in among the student group members. Finally, this program not only reviews the common risks that student leaders may encounter, but also facilitates discussions on how to identify and assess those risks on a daily basis (University of Florida, 2009).

Suggestions for Practice

Risk management education can be an excellent resource for colleges and universities seeking to reduce the occurrence of incidents on campus. In the “duty era” in which higher education institutions operate, colleges and universities can no longer rely on behavioral policies that only relay complex definitions and myriad consequences. Considering the aforementioned best practices, a comprehensive approach must be taken to ensure organization members are educated and prepared for any associated or potential risks. Colleges and universities should utilize the following steps in creating risk management education programs:

- University administrators must include students, or at least seek student input, in creating training programs. Even if students are unaware of the multiple facets that make up risk management, they are valuable in assessing the needs of the community and identifying the areas of need and improvement within their groups. According to Langford (2008), comprehensive approaches to prevention-based programs include the involvement of key campus stakeholders.
- Programs should be thorough. University administrators cannot assume that students know how to effectively assess and mitigate risks through the dissemination of policies and punishments. Administrators should educate student groups on the purpose and reasoning behind specific policies, ways to identify risk-related behaviors within their groups, and resources to prevent and reduce risk-related incidents within groups.
- Training programs should be inclusive. Administrators must acknowledge that risks can occur in organizations other than fraternities and sororities. From sports clubs and dance groups to varsity athletics and chess clubs, potential risky behaviors can occur no matter what the expressed purpose of an organization. According to Allan and Madden (2008), risk management issues, such as hazing, are characteristic of a variety of student groups. Institutions should be judicious in determining the breadth of categories of student organizations that need to be included and should consider creating a system to clearly communicate which organizations need to attend risk management training sessions.
- A risk management program must focus on education. Professionals consistently educate students on university policy and procedure. Yet, little time and effort is taken to educate students and student organizations of potential risks, statistics, and examples. Student organizations must be instructed in not just the campus operational “how to” for social events, or alcohol, but educated on alcohol itself, the reasons why social events can be

unsafe, and why hazing cannot be tolerated. Elaborating on the content of these issues will bring about not only compliance, but comprehension. The Alcohol Skills Training Program (ASTP) provides a primary example on the effectiveness of education within prevention based programs. According to Kivlahan et al (1990), ASTP informs students on the science of alcohol use and addiction and provides tips for safe alcohol consumption.

- To have a truly effective program, assessments and evaluations must be implemented. Whether through student surveys, the tracking of organizational offenses over time, or focus groups, institutions should identify the strengths and weaknesses of their programs in order to progressively improve year to year and thus provide more impactful educational opportunities.
- Institutions must be consistent. Whether through communicating policies, assessing consequences, or facilitating training, accountability is pivotal to gaining student trust, and through trust change can occur.

Conclusion

With the current state of the economy causing many states and higher education institutions to reevaluate and reduce sections of operational budgets, funding may not be available to implement state-wide legislation or create a new program on campus. Along with funding, some institutions may struggle in locating staff able to assume the responsibilities of effectively creating and implementing programs. Whether on a state or institutional level, actions must be taken to mitigate risks on campuses. Policy alone has been dispelled as a sole deterrent of illicit behaviors.

Colleges and universities should utilize a comprehensive approach to reducing and preventing risky behaviors on campus. Representatives from throughout campus need to be active in addressing this campus- and at times, community-wide issue. Whether through departmental collaboration, such as pairing the office of student organizations with an office of health promotions, or by the creation of a risk management task force, the implementation of risk management training and education that addresses students beyond fraternities and sororities has the potential to impact campus communities in positive ways.

Although further research is recommended to provide a true educational model, comprehensive risk management programs currently being implemented at Texas Tech University and the University of Florida provide benchmarks from which to initiate research. Assessments should be completed on current programs and legislation to determine what areas need to be adjusted and improved so that other states can emulate the aforementioned programs on their campuses. Risk management issues have been prevalent on college and university campuses for decades, and they will surely remain at the forefront of discussion. Institutions should not only attempt to control behaviors, but educate students on the identification and prevention of such behaviors to mitigate risk and promote student safety.

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