

WHAT HAPPENS WHEN THE BUBBLE BURSTS? WHY SPORTS TEAMS MUST LEARN FROM THE COLLAPSE OF THE DALLAS COWBOYS' PRACTICE FACILITY

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I. Introduction

The Dallas Cowboys' rookie workout session on May 2, 2009 began like any other at the team's practice facility in the Valley Ranch area of Dallas, Texas. However, the usual questions about quarterback Tony Romo's current girlfriend, the off-field problems of Adam "Pac-Man" Jones, and the decision to cut embattled receiver Terrell Owens, were soon replaced by those questioning the team's liability and decision making following a collapse of the team's six-year old practice facility.¹ The Cowboys, like many other teams in recent years, had built a practice "bubble" to provide a field of play for use under any weather condition.² Unfortunately, the Cowboys' bubble, built at a cost of \$4 million, could not withstand the force and pressure of the fierce 70 mph winds that ripped through the Valley Ranch area—ultimately destroying the practice bubble.³ Steel supports held up the Cowboys' bubble, and those supports came crashing down to the practice field, along with lights and other debris, leaving the players, coaches, support staff, and media personnel in the bubble running for safety.⁴ As a result of the bubble's collapse, twelve people were hospitalized. Scouting assistant Rich Behm was permanently paralyzed, special-teams coach Joe DeCamillis received a fractured vertebra, and athletic trainer Greg Gaither suffered two broken bones in his leg.⁵

Following the accident, Behm and DeCamillis filed a lawsuit against Summit Structures, LLC, and Cover-All Building Systems, Inc., among others, for their responsibility in building the structure that ultimately caused their injuries.⁶ Although, Behm and DeCamillis were unable to name the Cowboys as a defendant in the lawsuit,⁷ the Cowboys still may face disciplinary actions from the Occupational Health and Safety Administration (OSHA).⁸ Furthermore, given the prevalence of comparable practice facilities

¹ Amy K. Nelson, *Lessons learned from Cowboys tragedy*, ESPN.com, May 5, 2009, <http://sports.espn.go.com/nfl/news/story?id=4141498>. See also Harvey Fialkov, *Can This Bubble Burst? Unlike Cowboys' Metal-Supported Structure That Fell, Dolphins' Practice 'Bubble' is Light Fabric Filled With Air*, SUN-SENTINEL, May 7, 2009, at 1C (noting that former Cowboys coach Bill Parcells wanted an indoor facility and owner Jerry Jones built the bubble for Parcells' first season as coach in 2003).

² See *infra* Part I for a discussion of the NFL and college football teams that currently use practice bubbles.

³ Tom Orsborn, *Bubble wouldn't have burst*, SAN ANTONIO EXPRESS-NEWS, May 6, 2009, at 1D. See also Michael McCann, *Who's responsible for collapse of Cowboys' indoor practice facility?*, SI.com, May 4, 2009, http://sportsillustrated.cnn.com/2009/writers/michael_mccann/05/04/cowboys/index.html (noting that the Irving Police Department found that the Cowboys' practice bubble was the only building in the city to have structural damage from the storm).

⁴ Footage of the accident can be found on YouTube. There were many television cameras filming during the accident and the footage provides a glimpse of the chaos and commotion inside the bubble as the roof collapsed.

⁵ *OSHA sorts through flattened facility*, ESPN.com, May 5, 2009, <http://sports.espn.go.com/nfl/news/story?id=4136258>.

⁶ *Cowboys employees sue builders over collapsed practice facility*, usatoday.com, Aug. 25, 2009, http://www.usatoday.com/sports/football/nfl/cowboys/2009-08-25-cowboys-employees-lawsuit_N.htm.

⁷ Brooks Egerton, *Injured Dallas Cowboys staffers sue firms in practice facility collapse*, dallasnews.com, Aug. 25, 2009,

<http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/082609dnprocowboyscollapse.11542ae2e.html> (noting that workers' compensation laws in the state of Texas barred the Cowboys' employees from suing the team for the injuries sustained in the accident).

⁸ *OSHA sorts through flattened facility*, ESPN.com, May 5, 2009, <http://sports.espn.go.com/nfl/news/story?id=4136258>. OSHA inspectors arrived at the collapse site two days after the accident and have six months from the date of inspection to make a report. *Id.*

throughout the National Football League and collegiate athletics—and the history of structural problems many teams and other entities have faced with their bubbles—the likelihood of a similar disaster is almost a given.⁹ Thus, sports teams and college athletic departments that use practice bubbles must learn from the collapse of the Dallas Cowboys' facility or face the possibility of OSHA violations and other tort liabilities when the next bubble bursts.

Part I of this Comment provides background information on the practice bubbles currently in use by NFL teams and college athletic departments. It details the differences between air-supported and frame-supported bubbles and explains the history of the bubble collapses that occurred prior to the collapse of the Cowboys' facility. Part II provides insight on OSHA, particularly the OSHA general duty clause, which could subject teams to citations and financial penalties should a bubble collapse injure a team employee. Part III analyzes the potential for tort liability as a theory of recovery by any individual who may be harmed as a result of a team's bubble collapse. Finally, Part IV analyzes the likely OSHA penalties and tort liability that each team may face and explains that sports teams and college athletic departments must learn from the Cowboys' collapse and take precautionary measures to avoid legal and financial consequences. If they fail to heed these warnings, sports teams and college athletic departments will find themselves in a public relations nightmare with many legal remedies available to injured plaintiffs.

II. BACKGROUND ON BUBBLES IN THE SPORTS WORLD

Indoor practice bubbles are the new must-have in the professional and collegiate sports world. Practice bubbles are either frame-supported or air-supported structures with a membrane shell or cover that acts as the roof over the playing surface.¹⁰ As such, practice bubbles allow teams to avoid inclement weather such as rain and dust storms, extreme heat during the dangerously hot summer training camp months, and the frigid temperatures during playoff time.¹¹ In recent years, many professional and collegiate athletic departments have invested in practice bubbles as a way to assure that practices may continue in any weather condition.¹² NFL teams currently using practice bubbles include the Miami Dolphins, New York Giants, Denver Broncos, New England Patriots, Houston Texans, Philadelphia Eagles, and the Tennessee Titans.¹³ Furthermore, Arizona State University, Boston College, University of Texas, University of Iowa, Colorado University, Texas A&M, and the University of New Mexico are

⁹ See *infra* Part I for a discussion of the many NFL and college teams that currently use practice bubbles as well as an overview of some of the prior collapses that have occurred.

¹⁰ The two different types of bubbles look identical in their appearance, although the frame-supported bubble can be larger—a preference that some teams have for their bubble.

¹¹ Interestingly, one of the main reasons for the growth of practice bubble usage was the 2001 death of Korey Stringer at the Minnesota Vikings training camp. Mr. Stringer died from heat exhaustion, and his death spurred much publicity over the safety of workout conditions during the hot training camp months. See generally, Jarrett Bell, *A year after Stringer death: NFL wary, few changes*, usatoday.com, July 18, 2002, <http://www.usatoday.com/sports/nfl/stories/2002-07-19-cover.htm> (providing background information on Korey Stringer's death and the NFL's concern about players and heat-related injuries and deaths).

¹² Former Miami Dolphins coach Nick Saban requested that an indoor practice field be built so that the team would not lose practice time to summer lightning and rainstorms in South Florida. Fialkov, *supra* note 1, at 1C.

¹³ Nelson, *supra* note 1. The Broncos, Texans, Dolphins, Titans, and Giants all use air-supported bubbles. The Giants are currently constructing a new indoor facility built with brick and steel. The Eagles uses a frame-supported structure with steel trusses. The Patriots use a similar facility as the Cowboys also manufactured by Summit Structures.

some of the many college teams to also practice in a bubble.¹⁴ The facilities are a symbol of luxury and help a team's owner or athletic director convey a message that no expense is too great in the pursuit of winning. Despite the apparent benefits of building a bubble, however, safety issues have become a serious concern.¹⁵

A. Air Support vs. Frame Support

There are currently two types of bubble designs in use at NFL and collegiate practice facilities. The first type of facility is commonly referred to as a frame support, where steel support beams hold up the bubble membrane.¹⁶ Frame-supported structures are sometimes favored because they create more space inside.¹⁷ The second type of facility is merely supported by air and not by steel or metal beams and is often much cheaper to build than the frame-supported structure.¹⁸ The frame supports used in the Dallas Cowboys' facility were one of the main reasons injuries occurred on the day of the collapse.¹⁹ Presently, Texas A&M, the New England Patriots, and the University of New Mexico all use similar frame supported practice bubbles manufactured by Summit Structures, LLC—the same company that manufactured the Cowboys' failed facility.²⁰ The Philadelphia Eagles also use a frame-supported facility, albeit one not manufactured by Summit Structures. The remaining teams using practice bubbles all employ the air-support bubble commonly thought by many to be a safer alternative.²¹ However, the air-supported bubbles have also caused accidents and could result in serious injuries, especially when heavy lights hang from their ceilings.

B. Prior Accidents at Other Bubbles

1. The Philadelphia Port Authority Collapse

In 2002, the Philadelphia Regional Port Authority contracted with Summit Structures, LLC to manufacture a double vaulted 100,000 square foot frame supported membrane-covered building.²² The building was expected to meet the Port Authority's needs to accommodate increased business from importers using the port's facilities.²³ The structure was functionally completed by the end of 2002, and put in service on January 2, 2003.²⁴ Just six weeks later, a major snowstorm hit Philadelphia causing the

¹⁴ Aside from Texas A&M and New Mexico, all college programs appear to use air-supported bubbles.

¹⁵ See *infra* Section I.B for a history of the accidents at other teams' practice bubbles.

¹⁶ The Cowboys told the City of Irving that the bubble was a "semi-permanent structure supported by lightweight steel trusses and clad with a fire resistant polymer fabric." Orsborn, *supra* note 3, at 1D.

¹⁷ See Nelson, *supra* note 1 (noting that the University of New Mexico "decided to build a frame-supported structure instead of an air-supported bubble because it created more space inside, including room for footballs to be thrown higher and longer").

¹⁸ *Id.* The cost of a frame-supported structure can be double or triple the amount necessary to build an air-supported bubble.

¹⁹ John Maher, *Teams want to know: Could their bubbles burst?*, AUSTIN AMERICAN-STATESMAN, May 5, 2009, at C01 (explaining that the bubble's frame became a hazard and caused injury to twelve people).

²⁰ See Nelson, *supra* note 1.

²¹ *Id.* Donato Fraioli, the CEO and head engineer of Air Structures American Technologies Inc., was a proponent of the air-supported facilities after the Cowboys' collapse. Mr. Fraioli was quoted as saying, "Our structures are air-supported and do not rely on being held up by a large aluminum or steel-supported frame. There's no question . . . we highly promote the air-supported structure over the frame-supported structure." *Id.*

²² *The Philadelphia Regional Port Authority v. Carusone Construction Co., et al.*, No. 2701, 2007 Phila. Ct. Com. Pl. LEXIS 272, at *40 (May 14, 2007).

²³ *Id.* at 2.

²⁴ *Id.* at 23.

structure's collapse.²⁵ The Philadelphia Port Authority filed a lawsuit against Summit Structures, among others, and the Philadelphia Court of Common Pleas found that various forms of negligence in the design and construction of the building were factual causes of the collapse.²⁶ The trial court awarded compensatory damages of almost \$4 million to the Port Authority.²⁷

2. The New York Giants' Collapse

In December 2007, the New York Giants' practice bubble collapsed after strong winter winds moved through the Newark area causing a set of revolving doors to detach from their foundation, creating a gap that allowed all of the air to escape out of the bubble.²⁸ The Giants' bubble was normally used for practices and as a pre-game VIP lounge; however, the 2007 incident was the third time in four years that weather caused the bubble to collapse.²⁹ The previous incidents were also caused by stormy conditions including large amounts of snow accumulation on the bubble.³⁰ Unlike the Cowboys' facility, the Giants' bubble was air-supported—meaning the large steel beams that caused injuries to the Cowboys' employees were not a factor in the Giants' bubble collapse.³¹ Air Structures American Technologies Inc. (ASATI) built the Giants' bubble, as well as those for the Jets, Eagles, and Dolphins.³²

3. The Arizona State University Collapse

In August 2008, Arizona State University's newly built practice bubble only housed the team's practices a total of eight times before collapsing to the ground.³³ The air-supported bubble came crashing down after strong storms blew through campus.³⁴ The accident occurred at night—so nobody was inside of the bubble—but the collapse left the bubble unusable for the rest of the season.³⁵ Yeadon Structures built ASU's facility at a cost of \$8.4 million and the repair estimates to the bubble were approximately an additional \$1 million.³⁶ ASU's bubble has since been rebuilt and continues to house the team's practices and off-season training camp.

²⁵ *Id.*

²⁶ *Id.* at 1.

²⁷ *Id.*

²⁸ Ralph R. Ortega & Julie O'Connor, *Threats of winter storm are deflated. Giants Stadium takes hit, but state's snow levels don't materialize*, THE STAR-LEDGER, Dec. 17, 2007, at 1.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Fialkov, *supra* note 1, at 1C.

³³ Dan Zieger, *Storm takes down ASU sports practice bubble*, eastvalleytribune.com, Aug. 29, 2008, http://www.eastvalleytribune.com/article_ce70ca0b-29f7-5b31-88bc-7d47bdad48c3.html?mode=story.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Scott Bordow, *Bubble collapse should have ASU's attention*, eastvalleytribune.com, May 4, 2009, <http://www.eastvalleytribune.com/story/138764>. Interestingly, former ASU quarterback Rudy Carpenter was inside the Cowboys' bubble during the collapse and said he was incredibly fortunate not to be hurt. *Id.*

III. OSHA and the General Duty Clause

A. Background on the Occupational Safety and Health Administration (OSHA)

In 1970, Congress passed the Occupational Safety and Health Act—thereby creating a new federal agency known as the Occupational Safety and Health Administration (OSHA).³⁷ Congress entrusted OSHA with the enforcement of the Act to assure working men and women a safe and healthy working environment.³⁸ OSHA is not a federal agency designed to compensate injured persons harmed by an employer's working conditions. Rather, "[t]he Act is intended to force employers to take action against preventable injuries and deaths."³⁹ As such, the Act allows for the fining of employers, which presumably acts as a deterrent to unsafe and hazardous working conditions.⁴⁰ Injured employees are then left to seek compensation for their injuries under workers' compensation laws or through remedies in tort.⁴¹

Investigation of a workplace catastrophe or fatal accident is one of the main duties of OSHA. An employer must report a catastrophic or fatal accident resulting in the hospitalization of three or more employees within eight hours of the event's occurrence.⁴² OSHA also may investigate an accident under this provision if the accident "receives significant publicity, even in the absence of injuries."⁴³ After investigation, OSHA determines whether any OSHA standards were violated and penalizes the employer through citations and financial penalties.⁴⁴ Unfortunately, OSHA often has its hands full—over 4 million workers were injured on the job in 2006—making OSHA investigation of every workplace accident unlikely.⁴⁵

B. The OSHA General Duty Clause

The OSHA general duty clause may be thought of as a "catch all" provision allowing the agency to find an employer violation where a promulgated standard does not apply.⁴⁶ Many promulgated standards deal with hazards such as lead, asbestos, cotton dust, and grain dust—all hazards that could

³⁷ Michael J. Siris, *OSHA Compliance or Non-Compliance: Admissible in Federal Products Liability Actions to Prove a Machine's Safety or Defect?*, 25 ARIZ. ST. L. J. 659, 659 (1993).

³⁸ Richard S. Morey, *The General Duty Clause of the Occupational Safety and Health Act of 1970*, 86 HARV. L. REV. 988, 988 (1973), *See also* David J. Kolesar, Note, *Cumulative Trauma Disorders: OSHA's General Duty Clause and the Need for an Ergonomics Standard*, 90 MICH. L. REV. 2079, 2084 (1992) (citing 29 U.S.C. § 651(b)(1988)).

³⁹ Morey, *supra* note 38, at 992.

⁴⁰ *Id.* at 993.

⁴¹ *Id.*

⁴² *See* <http://www.osha.gov/doc/outreachtraining/htmlfiles/introscha.html> (providing background on the reporting requirements that must satisfy following a workplace accident).

⁴³ Robert E. Rader, Jr., Ira B. Smotherman, & Douglas B.M. Ehlke, *How to Handle an OSHA Case: An Employer's Rights and Options*, 33 BAYLOR L. REV. 493, 496 (1981) (citing OSHA Field Operations Manual, Chapter XVI § A.2.).

⁴⁴ *Id.* at 497-98.

⁴⁵ Lynn Rhinehart, *Workers at Risk: The Unfulfilled Promise of the Occupational Safety and Health Act*, 111 W. VA. L. REV. 117, 120 (2008).

⁴⁶ Kolesar, *supra* note 38, at 2086 (noting that "the general duty clause plays a secondary role" in the Act's enforcement scheme as an applicable promulgated standard will take precedence over the general duty clause).

cause occupational diseases such as cancer, asbestosis, and brown lung.⁴⁷ However, not all workplaces deal with such a limited range of dangerous hazards. Therefore, due to the wide ranges of employment conditions covered by the Act, the general duty clause necessarily provides a sufficient level of safety to those employees whose employment conditions do not directly correlate with a promulgated standard.

The general duty clause is enumerated in Section 5(a)(1) of the Act and provides as follows:

(a) Each employer—

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees⁴⁸

In 1973, the D.C. Circuit became the first circuit to interpret the general duty clause. In *National Realty & Construction Co. v. OSHRC*,⁴⁹ the court found that OSHA must satisfy four elements to prove a general duty violation: (1) the employer has failed to “free” its workplace of a hazard; (2) the hazard is “recognized”; (3) the hazard could have been materially reduced or eliminated by a feasible means of abatement; and (4) the hazard is “causing or likely to cause death or serious physical harm.”⁵⁰

C. Recognized Hazards

Pursuant to the statutory language of the general duty clause, an employee must be harmed by a recognized hazard prior to OSHA finding a violation of the clause. The legislative history of the Act⁵¹ and precedent from the federal circuits⁵² provide guidance on the tests used to determine whether a workplace hazard is “recognized” for the purposes of OSHA. Specifically, a “recognized hazard” is commonly interpreted as one that is known to the employer or generally recognized as such in a particular industry.⁵³

⁴⁷ Rhinehart, *supra* note 45, at 120 (explaining that the Act has significantly improved safety and health conditions for many workers dealing with these types of working conditions).

⁴⁸ 29 U.S.C. § 654 (a)(1) (1970).

⁴⁹ 489 F.2d 1257 (D.C. Cir. 1973).

⁵⁰ *Id.* at 1265. See also, Kolesar, *supra* note 38, at 2090 n.87 (explaining that the *National Realty* court articulated elements one, two, and four, while implying element three).

⁵¹ Morey, *supra* note 38, at 995 n.37 (noting that Representative Daniels, in proposing an amendment which became the final version of the general duty clause, stated: “A recognized hazard is a condition that is known to be hazardous, and is known not necessarily by each and every individual employer but is known taking into account the standard of knowledge in the industry.” The legislative history of the Act also provides that recognized hazards are those that can be readily detected by the human senses or those generally understood to be hazardous. See Congressman Lloyd Meeds, *A Legislative History of OSHA*, 9 GONZ. L. REV. 327, 346 (1974) (noting that the House language differed from the language in the Senate bill and the conference committee compromised by adopting the language describing a recognized hazard that is currently used in the Act).

⁵² See, e.g., *Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902, 910 (2d Cir. 1977) (holding that the dangerous potential of a condition or activity must actually be known either to the particular employer or generally in the industry); *Brennan v. OSHRC*, 501 F.2d 1196, 1201 (7th Cir. 1974) (explaining that a “recognized hazard has been defined as a condition that is known to be hazardous, and is known not necessarily by each and every individual employer but is known taking into account the standard of knowledge in the industry...”).

⁵³ Ethel R. Alston, Annotation, *What is “recognized hazard” within meaning of general duty clause of the Occupational Safety and Health Act (29 U.S.C.A. 654(a)(1))*, 50 A.L.R. Fed. 741 (1978).

The *National Realty* court made clear that an activity may be a recognized hazard regardless of the ignorance of the employer to the hazard's existence.⁵⁴

D. Causation of Death or Serious Physical Harm

OSHA will not find a violation of the general duty clause unless the workplace hazard is causing or is likely to cause death or serious physical harm. This clause exempts workplace conditions that could only cause physical harm upon "a freakish or utterly implausible concurrence of circumstances."⁵⁵ Thus, a violation of the general duty clause requires that "reasonably foreseeable circumstances could lead to the perceived hazard's resulting in serious physical harm or death."⁵⁶

E. Citations and Penalties

An OSHA violation does not provide a private civil remedy for employees who have been injured by an employer's violation of the general duty clause.⁵⁷ Instead, the Act limits the employer's liability to citations carrying financial penalties up to \$70,000 for each violation of the clause.⁵⁸ There are five types of OSHA citations: (1) serious violations; (2) nonserious violations; (3) repeat violations; (4) willful violations; and (5) failure to abate violations.⁵⁹ The financial penalty issued as a result of these violations is paid to the government as a deterrent to further unlawful conduct.⁶⁰ As such, an OSHA penalty does not compensate an injured employee otherwise covered by the Act.⁶¹

III. Tort Liability in the Practice Bubble

Professional sports teams and college athletic departments will likely face liability in tort as a result of their use of a practice bubble if the bubble should malfunction and cause injury. Common law theories of negligence and the duty of reasonable care provide a basic standard level of conduct that teams

⁵⁴ *National Realty*, 489 F.2d at 1265 n.32 (explaining that the legislative history of the act showed that the drafters of the statute meant for the "recognized hazard" determination to be an objective one).

⁵⁵ *Id.* at n.33.

⁵⁶ Morey, *supra* note 38, at 997-98.

⁵⁷ *See, e.g., Russell v. Bartley*, 494 F.2d. 334, 335 (6th Cir. 1974) (holding that a civil penalty and right to injunctive relief under the Act applies only to employers and does not create, directly or impliedly, a private civil remedy in favor of employees); *Byrd v. Fieldcrest Mills, Inc.*, 496 F.2d 1323, 1323 (4th Cir. 1974) (holding that employee's negligence claim was barred by North Carolina's Workmen's Compensation Act and that plaintiff was not entitled to recover damages from employer for alleged negligence under the Act).

⁵⁸ 29 U.S.C. § 666(a) (1970).

⁵⁹ Rader, *supra* note 43, at 497-98. A serious violation is one in which a fatality or serious physical injury has occurred or has a substantial probability of occurring. *Id.* at 497. A nonserious violation is only issued for a violation of a specific standard and may not be issued for a violation of the general duty clause. *Id.* at 498. A repeat violation is issued when an employer repeatedly violates the requirements of the Act. *Id.* A willful violation is issued when an employer knowingly or willfully violates the Act. *Id.* A failure to abate violation is issued when an employer fails to correct a previous violation for which a citation has been issued. *Id.*

⁶⁰ *See Rhinehart, supra* note 45, at 133 (noting that the current penalties under the statute are meant to have a deterrent effect, but arguing that they fail to do so given that they are much lower than other administrative law penalties). The financial penalties were last increased in 1990 and have since lost thirty-five percent of their value due to inflation. *Id.*

⁶¹ *See McCann, supra* note 3 (noting that "[a]ny fines levied by OSHA . . . would be paid to the U.S. Government").

must meet. For example, any team that erects a practice bubble owes a duty of reasonable care to all those that enter the facility. As there is the potential for many fans, members of the media, and other guests to be inside of the bubble, an analysis of the potential tort ramifications facing these teams is important.

A. The Common Law Duty of Reasonable Care in Premises Liability Law

Entrants onto private land are generally categorized into three main groups: (1) invitees; (2) licensees; and (3) trespassers.⁶² Invitees are those that have been invited onto the land by the landowner.⁶³ Licensees are those entrants who are “privileged to enter or remain on land only by virtue of the possessor’s consent.”⁶⁴ The distinction between the two groups is subtle, yet the landowner’s duty to licensees and invitees differed at common law.⁶⁵ For example, at common law, a landowner must warn invitees of conditions on the land that may cause harm.⁶⁶ On the other hand, landowners must inform licensees of any dangers of which they are aware and which they would “expect the licensee not to discover or realize.”⁶⁷ Many states have altered the categorical analysis of visitors on a landowner’s property and mandate that the landowner owe a duty of reasonable care to keep premises safe for all lawful visitors—regardless of whether the individual is an invitee or licensee.⁶⁸ Despite the fact that many states now require a reasonable duty of care to all persons entering the property, teams would still owe a duty under the traditional common law tests as well. The invitee would need to know that the practice bubble is a condition that could cause harm and the licensee would not be expected to discover or realize any of the bubble’s structural defects. Therefore, regardless of the distinction between licensee and invitee, sports teams owe a duty to warn all entrants of possible defects with the practice bubble.

B. OSHA Violations as Evidence of Negligence

Many state and federal courts find that an OSHA violation is relevant to the standard of care owed to a plaintiff in a torts lawsuit. Any tort action that would result from a collapsed practice bubble would ultimately be decided based on the team’s negligence. If any of the team’s employees were hurt in the accident, OSHA would likely choose to investigate.⁶⁹ Furthermore, OSHA would be required to investigate the accident should a team employee be killed in the bubble collapse.⁷⁰ Consequently, in many jurisdictions, OSHA’s findings would be admissible in a negligence lawsuit against a team as strong evidence of the team’s negligence.

⁶² Ann Fievet, Comment, *Breaking the Law and Getting Paid For It: How the Third Restatement of Torts Synthesizes Two Distinct Standards of Care Owed to Trespassers*, 44 WAKE FOREST L. REV. 239, 241 (2009).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Samuel E. Tuma, Comment, *Occupiers of Land Must Exercise Reasonable Care For All Lawful Visitors: Ford v. Board of County Commissioners of the County of Dona Ana*, 25 N.M. L. REV. 373, 375-76 (1995) (providing a good background on the states that have abandoned the traditional common law rules of premises liability).

⁶⁹ See Rader *supra* note 43, at 496 (explaining that OSHA must investigate a workplace accident considered to be a catastrophe when five or more employees are hospitalized and can also investigate accidents that receive significant publicity). The fact that OSHA will investigate workplace accidents that receive significant publicity is important because any accident at a practice bubble will surely receive extensive media coverage.

⁷⁰ *Id.*

1. *OSHA Violation as Evidence of Negligence Per Se*

There is some evidence that courts do recognize an OSHA violation as evidence of negligence per se by the employer.⁷¹ Although, very few courts follow this reasoning, it is important to examine these cases in order to understand the interplay between OSHA violations and negligence in a tort cause of action. For example, the Iowa Supreme Court held that “[i]f a statute lays down a rule or regulation of conduct specifically designed for the safety of and protection of persons or property, injuries proximately resulting from its violation to one who, under the circumstances of the case, is within its purview, and free from contributory negligence, would be actionable, as for negligence per se.”⁷² The Iowa court went on to explain, “a violation is evidence of negligence as to all persons who are likely to be exposed to injury as a result of the violation.”⁷³ Some courts will limit the admissibility of evidence of an employer’s OSHA violation as negligence per se to those cases in which the plaintiff is “a member of the class of persons that the OSHA regulation was intended to protect.”⁷⁴ Although both state and federal courts have held that employer’s OSHA violations are evidence of negligence per se, those holdings continue to be the minority rule.

2. *OSHA Violation as Evidence of Negligence*

The far more prevalent view of federal and state courts recognizes that a fact finder may consider OSHA violations as bearing on the duty of care required by a defendant in a tort cause of action, but not as negligence per se.⁷⁵ In *Wal-Mart Stores Inc. v. Seale*,⁷⁶ the Texas Court of Appeals held that an OSHA violation has relevance to the standard of care regardless of whether the plaintiff was an employee entitled to protection under the act.⁷⁷ Some courts even find that an OSHA standard—whether violated or not—is evidence of the standard of care. As the Third Circuit held in *Rolick v. Collins Pine Co.*:⁷⁸

⁷¹ See, e.g., *Kelley v. Howard S. Wright Constr. Co.*, 582 P.2d 500, 508 (Wash. 1978) (holding that a violation of an OSHA regulation would be negligence per se because “applicable safety regulations were specifically authorized for the purpose of making safe the employees’ place of work, and that employers and workmen alike had full and adequate notice of the existence of the regulations”); *Arthur v. Flota Mercante Gran Centro Americana S.A.*, 487 F.2d 561, 563-64 (5th Cir. 1973) (holding that a violation of an OSHA regulation was negligence per se when an inspector was injured while boarding defendant’s ship).

⁷² *Koll v. Manatt’s Transp. Co.*, 253 N.W.2d 265, 270 (Iowa 1977).

⁷³ *Id.* In the case, plaintiff was the administrator of the deceased’s estate and although the deceased was not an employee of the defendant, the decedent was exposed to injury from the alleged OSHA violation.

⁷⁴ See, e.g., *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799, 805 (6th Cir. 1984) (holding that plaintiff was a member of the class of persons protected under the applicable OSHA regulation and ordering that plaintiff be entitled to a jury instruction on his negligence per se claim).

⁷⁵ See, e.g., *Brady v. Ralph M. Parsons Co.*, 609 A.2d 297, 306 (M.D. 1992) (holding that “although evidence of a violation of an [OSHA] standard may be admissible in an appropriate case to assist the trier of fact in determining whether an employer or one having the duty of an employer was negligent, proof of a violation of such a standard does not establish negligence *per se*”); *O’Neil v. Wells Concrete Products Co.*, 477 N.W.2d 534, 537 (Minn. App. 1991) (holding that testimony on applicable OSHA standards was relevant to the standard of care); *Cardin v. Telfair Acres of Lowndes County, Inc.*, 393 S.E.2d 731, 733 (Ga. App. 1990) (holding that a violations of OSHA regulations should be admissible as evidence of legal duty).

⁷⁶ 904 S.W.2d 718 (Tex. App. 1995).

⁷⁷ *Id.* at 720 (affirming the trial court’s finding that the store’s negligence was the sole cause of the accident and finding alternatively that OSHA regulations were admissible as relevant to the standard of conduct that Wal-Mart should have provided to plaintiff customer).

⁷⁸ 975 F.2d 1009 (3d Cir. 1992).

[w]e can think of no reason . . . why the OSHA regulation is not relevant evidence of the standard of care once it is determined . . . under [state] law the defendants could owe plaintiff a duty of care. It is important to reiterate that to use the OSHA regulation as evidence here is not to apply the OSHA [regulation] itself to this case. Rather it is to ‘borrow’ the OSHA regulation for use as evidence of the standard of care owed to plaintiff.⁷⁹

Wal-Mart and *Rolick* both provide excellent examples of a court’s willingness to find that OSHA violations and OSHA regulations are relevant to the standard of care in a negligence lawsuit.

IV. Understanding The Accident: Professional Teams And College Athletic Departments Must Learn From The Cowboys

Given the applicability of the general duty clause, the history of prior accidents, and the real possibility of future physical harm, professional sports teams and college athletic departments must learn from the Dallas Cowboys’ practice bubble collapse. Unfortunately, it is only a matter of time before the next practice bubble collapses, thus, it is imperative that teams understand the potential legal and financial ramifications of such an accident while taking the necessary steps to help limit their liability.

A. OSHA Violations from a Bubble Collapse

Any team or college athletic department would likely be the subject of an OSHA investigation should a practice bubble collapse.⁸⁰ Team employees that could be injured by the collapsed bubble include players, coaches, support staff, front office personnel, and any other individual covered as an “employee”⁸¹ under the Act—provided they are not an independent contractor.⁸² However, college athletic departments are a different story as any student athlete injured by the collapse would not enjoy protection from OSHA as the student athlete is generally not considered to be an employee of the university.⁸³ OSHA still could investigate any collapse if a coach or other employee of the university or athletic department suffers an injury. Regardless of whether the practice bubble is owned by a college or professional sports team, the general duty clause applies as the bubble meets the applicable four-part test found within the statute and case precedent.⁸⁴

⁷⁹ *Id.* at 1014.

⁸⁰ Due to the fact that the potential for physical harm is high, and the history of accidents at other bubbles, it seems almost certain that OSHA would investigate any future bubble collapse.

⁸¹ Under the Act, the term “employee” means “an employee of an employer who is employed in a business of his employer which affects commerce.” 29 U.S.C. § 652(6) (1970).

⁸² Independent contractors are not “employees” entitled to protection under federal employment law statutes.

⁸³ Although this is the prevailing legal classification at the moment, some scholars have argued for a contrary interpretation. *See generally*, Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH L. REV. 71 (2006) (arguing that the reality of student-athletes’ daily lives qualifies them as employees entitled to protection under the National Labor Relations Act).

⁸⁴ See Section II.B. for a discussion of the four-step test to determine a violation of the general duty clause.

1. A Practice Bubble is a Recognized Hazard in the Sports Industry

The Dallas Cowboys' collapse clearly brings the problems associated with the use of practice bubbles to the forefront in the sports world. As such, a practice bubble should now be considered as a "recognized hazard" for the purposes of OSHA's general duty clause. The possibility of a practice bubble collapse is undoubtedly known to the sports world and all teams that currently use a bubble, or are thinking of beginning to use a bubble, are on notice of the inherent problems with their usage. Furthermore, a bubble collapse is likely to cause death or serious physical injury, thus satisfying the other key requirement of the general duty clause. Practice bubbles collapse with regularity, and the fact that the only known instance of physical injury occurred at the Cowboys' facility does not lessen the severity of the safety concerns, nor take the bubble's safety issues outside the realm of a "recognized hazard." The collapse of the Cowboys' bubble is sufficient to satisfy the criteria for a recognized hazard under the general duty clause.⁸⁵

There is of course much debate over whether an air bubble is safer than a frame-supported bubble.⁸⁶ Given this public debate—and the reality that teams are not likely to forego using practice bubbles⁸⁷—teams should recognize a few main points. First, the frame-supported bubbles manufactured by Summit Structures, LLC and used by the Cowboys, Patriots, New Mexico, and Texas A&M are highly unsafe and the potential for disaster is imminent.⁸⁸ Inclement weather forces these bubbles to the brink of collapse whether it is the presence of high winds or large accumulations of snow. A heavy snowfall caused the Philadelphia Port Authority collapse and strong winds caused the Cowboys collapse. Thus, the other teams that use bubbles manufactured by Summit Structures do so at their own peril. Windy conditions are just as likely in the area surrounding the campus at Texas A&M as they were in Dallas. Furthermore, the Boston area of New England gets just as much snowfall as Philadelphia. Any argument that the windy conditions in Dallas were a freakish occurrence is severely hindered by the report that the Cowboys' bubble was the only damaged structure in the area.⁸⁹ Therefore, the bubble appears to be the problem—not the weather conditions.

2. The Hazard can be Materially Reduced or Eliminated by a Feasible Means of Abatement

A practice bubble, as a recognized hazard, can be materially reduced or eliminated by a feasible means of abatement. Some suggestions include discontinuing the use of the frame-supported bubble, discontinuing the use of a practice bubble all together, and establishing procedures for evacuating the bubble during inclement weather. All suggested actions are feasible and would only require a few front office meetings and training sessions to get the proper people in place.

⁸⁵ All that OSHA requires is that the hazard be recognized by the employer or known within the industry. It would be hard to imagine any team that uses a practice bubble not recognizing the possible hazards associated with using the bubble following the Cowboys' collapse.

⁸⁶ See discussion *supra* Section I.A.

⁸⁷ After the Cowboys' bubble collapse, many teams noted they were monitoring the investigation into what caused the Cowboys' collapse but did not have immediate plans to discontinue using their bubble. Nelson, *supra* note 1.

⁸⁸ The basis for this stems from the fact that each bubble was manufactured by Summit Structures, the same manufacturer of the Cowboy's facility, as well as the fact that each bubble is steel-supported. Furthermore, each location carries the distinct possibility of inclement weather.

⁸⁹ McCann, *supra* note 3.

3. The Hazard is Likely to Cause Death or Serious Physical Harm

The Cowboys collapse provides sufficient evidence that a practice bubble can cause death or serious physical harm.⁹⁰ The likelihood of death or serious physical harm is high any time steel-support beams or other debris fall on an individual.

4. Teams Must Free Their Workplace of the Recognized Hazard

Once it is established that the practice bubble is a recognized hazard that is likely to cause death or serious physical harm, and is the type of hazard that can be materially reduced or eliminated by a feasible means of abatement, under the Act, the team must free the workplace of the recognized hazard. All teams that currently use practice bubbles must have plans in place to ensure that they do not face legal ramifications and a public relations nightmare if their bubbles collapse. Specifically, all of these teams should create policies and procedures to ensure the safety of those employees inside the bubble. Teams should designate a committee or outside team of investigators to examine the bubble's structural supports for any defects. A known structural defect must be fixed immediately and teams must not be complacent in examining their current facilities. In October 2009, the National Institute of Standards and Technology (NIST) reported its findings after studying the Cowboys' bubble collapse.⁹¹ The draft report specifically found fault with the structure of the frame-supported bubble.⁹² The NIST also recommended "fabric-covered steel frame structures be evaluated to ensure the adequate performance of the structural framing system under design wind loads."⁹³ Due to the structural deficiencies in the frame-supported practice bubble, "[b]uilding owners, operators, and designers are strongly encouraged to act upon [the NIST's] recommendation."⁹⁴

An extreme step, but perhaps a necessary one, would require that the Patriots, Texas A&M, and New Mexico all cease their current use of frame-supported bubbles. Discontinuing the use of a frame-supported bubble would free the workplace of a recognized hazard and prove to the sports industry, and OSHA, that teams are taking the necessary precaution to prevent another catastrophic accident. If the team chooses not to take such a drastic step, the team must at least refrain from using the bubble until the bubble's structure is examined in accordance with the recommendations by the NIST.

B. Tort Remedies for a Team's Negligence

Liability in tort is always a potential remedy that an injured individual could seek should another practice bubble collapse. The professional sports team or college athletic department that uses the bubble would be a likely defendant in a lawsuit based on the deep pockets of team owners and universities. The team's negligence would be based on the need to provide a reasonable duty of care to those who enter the practice bubble. Although some workers' compensation laws may prevent team employees from suing to

⁹⁰ See *supra* Introduction for a discussion of the injuries suffered by some Cowboys' employees.

⁹¹ Brooks Egerton, *Federal report blames Dallas Cowboys' practice facility collapse on several design flaws*, *dallasmorningnews.com*, Oct. 6, 2009, <http://watchdogblog.dallasnews.com/archives/dallas-cowboys/>.

⁹² *Draft Report on the Collapse of the Dallas Cowboys' Indoor Practice Facility*, May 2, 2009, available at, http://www.bfrl.nist.gov/investigations/pubs/NISTIR7636_Oct2009.pdf.

⁹³ *Id.* at 86.

⁹⁴ *Id.* at 87.

recover in tort,⁹⁵ members of the media and other civilians regularly enter the practice bubbles and could seek to remedy their injuries through a negligence lawsuit.

1. The Injured Party as Plaintiff Would Likely Prevail in a Negligence Lawsuit

Regardless of whether a person inside the bubble is a licensee or invitee, all sports teams owe that person the duty to warn about possible defects with the practice bubble. The Cowboys' collapse, along with prior collapses at other facilities, has alerted all other teams about the possible defects with their practice bubble. Therefore, these teams must notify entrants into the bubble about the possibility of structural defects in the design and manufacture of the bubble. These entrants would not be able to recognize structural defects and other potential for harm from entering the bubble—so the duty must rest with the team to provide the necessary information to entrants allowing them the free choice of whether or not to enter the bubble. Due to the prior accidents at other bubbles, and the strong likelihood that a plaintiff's injury would be severe, a team is likely to lose at trial or face a large settlement amount to end the case.⁹⁶ Thus, teams must do everything they can to ensure that entrants are safe and informed—thereby limiting a team's liability should an accident occur.

2. Steps Teams Should Take to Decrease Their Liability

Teams are not powerless from limiting their liability. In fact, there are many steps that teams must take in order to do so. For example, teams should make those entering the bubble sign waivers providing that a team would not have any liability to the individual should an injury occur. These waivers are routinely used in other aspects of the sports world including when playing in a sporting event or participating in activities such as skydiving.⁹⁷ Teams may resist these waivers and may see them as tedious and unnecessary. Despite these sentiments, waivers should at least be used in inclement weather conditions. Furthermore, teams ought to limit public access altogether when possible. Although the media generally must have access to the practice bubble given their important duties in covering team practices, the outside public should be banned from entering the bubble as much as possible. Finally, teams must designate a team official with the authority to evacuate the bubble should the official deem it necessary for safety reasons. Coaches, players, and front office staff are likely too busy watching practice to handle this duty. Thus, teams should authorize someone with stadium or game operations experience to handle this endeavor. Providing a single individual with the authority to make the official decision to evacuate the bubble will avoid the chaos seen in the minutes following the Cowboys' disaster and hopefully prevent injuries before they occur.

V. Conclusion

On May 2, 2009, the sports viewing audience was focused on major events including the Kentucky Derby and NBA Playoffs. Soon all eyes turned towards the surprising television footage from Dallas where a practice bubble—a facility that has become familiar to many in the sports world—came crashing to the ground leaving players, coaches, team employees, and members of the media running for safety. After the reports of serious injuries, and after OSHA's team of investigators descended upon the accident scene, discussion turned toward the Cowboys' potential legal liability for the collapse. Many

⁹⁵ Many state worker's compensation laws limit the compensation to an employee to that found within the worker's compensation statute.

⁹⁶ McCann, *supra* note 3 (noting that a team would have to settle a negligence lawsuit in the millions of dollars).

⁹⁷ See Mario R. Arango & William R. Trueba, Jr., *The Sports Chamber: Exculpatory Agreements Under Pressure*, 14 U. MIAMI ENT. & SPORTS L. REV. 1, 32 (1997) (noting that a sky-diving business in Miami requires participants to sign an 'assumption of the risk,' 'exemption from liability,' and a 'covenant not to sue').

questions were discussed including: Could the Cowboys be liable in tort for the injuries sustained by team employees? Would the Cowboys face any OSHA penalties for providing an unsafe workplace? Would the manufacturer of the practice bubble face a products liability lawsuit?⁹⁸

Some of these questions have yet to be answered, but hopefully many soon will be.⁹⁹ Given the prior collapses at other practice bubbles,¹⁰⁰ and the seriousness of the Cowboys' collapse, professional sports teams and college athletic departments must take remedial steps to prevent injuries or face potential liability when the next bubble collapses. There are many simple procedures and policies that teams can implement to limit their liability in a torts case or OSHA investigation. Some examples of these policies include limiting access to the bubble, asking entrants to sign liability waivers or covenants not to sue before entering the bubble, designating a team employee with the duty to evacuate the bubble during inclement weather, replacing all frame-supported bubbles with air-supported facilities, and even ceasing use of the practice bubble all together.

Unfortunately, a practice bubble is likely to collapse again given their prior history. Teams that heed these warnings and remain concerned about the safety of those inside the bubble will be in a much better legal position when another collapse does occur.

⁹⁸ See McCann, *supra* note 3. Professor McCann discussed many of these questions in his article.

⁹⁹ OSHA has not yet released its findings from its investigation into the Cowboys' practice bubble collapse. The lawsuit brought by the injured Cowboys' employees against the manufacturers of the practice bubble is still at the early stages of the litigation process.

¹⁰⁰ See *supra* Section I.B.