

ALERTS

Connecticut Supreme Court Lets Jury Verdict Stand in *Munn v. Hotchkiss School*

September 7, 2017

The Connecticut Supreme Court (the “Court”) has issued a ruling supporting a Connecticut jury’s decision in 2013 to award \$41.75 million dollars^[1] to a student for injuries sustained as a result of contracting tick-borne encephalitis on a school trip abroad.^[2] The Hotchkiss School organized a month-long trip to China in 2007. During the trip, students hiked to the top of the forested Mount Panshan. A few students decided to hike down, while the others took a cable car. The students who hiked followed narrow dirt trails, getting lost among trees and through brush. One student received multiple insect bites, and began feeling ill 10 days later. Her condition worsened rapidly and she was taken to a local hospital, then transferred to Beijing, and ultimately was airlifted to New York. The student suffered extensive injuries, including partial paralysis, loss of the ability to speak, and loss of some cognitive function. She sued the school, alleging that the school was negligent in failing to warn students and their parents about the risks of insect-borne diseases and failing to provide protective clothing and insect repellent.^[3]

The school appealed to the Second Circuit Court of Appeals, which in turn certified two questions of law to the Connecticut Supreme Court for guidance: (1) whether Connecticut public policy supported imposing a duty on a private school to warn about or protect against the risk of insect-borne diseases when organizing a trip abroad and (2) if so, is a jury award of \$41.5 million for a student who contracted such a disease on a school trip excessive?

On Aug. 11, 2017, the Court issued a ruling, answering the first question by finding that the state's public policy does impose an affirmative duty on a school to warn about or to protect against the risk of serious insect-borne diseases when organizing a trip abroad. This Court did not address the issue of whether the injuries were reasonably foreseeable because the Second Circuit Court of Appeals had already determined in its 2015 decision that the evidence presented at trial was sufficient to support the jury's verdict that the student's illness was foreseeable. Schools are obligated to exercise reasonable care to protect students from foreseeable harms, and the Court found "no compelling reason to create an exception in this case for foreseeable serious insect-borne diseases."^[4]

In considering whether the state's public policy imposes a legal duty, the Court examined the following four factors:

1. Normal expectations of the participants in the activity. The Court found that the normal expectations of students and parents in a school sponsored educational trip abroad are that the "organizer of the trip would take reasonable measures to warn participants and their parents about the serious insect-borne diseases that are present in the areas to be visited and to protect children from those diseases." The Court reasoned that the school and its personnel have superior knowledge regarding the nuances of travel plans and itineraries. Most importantly, the school has a responsibility to protect minors "in assuming physical custody and control over its students, effectively [taking] the place of parents and guardians" Because of the serious dangers posed by insect-borne diseases, the availability of information regarding the trip and risks thereof, and the existence of low-cost measures to prevent such illnesses, students would normally expect the school to pass along appropriate warnings and to use reasonable care to minimize the risk of insect-borne diseases in the areas to be visited.
2. Encouraging participation, while weighing the safety of the participants. Although the policy of the state encourages its students, teachers, and administrators to travel, the Court disagreed with the school that recognizing the school's legal duty in these circumstances would have a chilling effect on school trips and travel. The Court stated that the "school's general duty to protect its students [including] the responsibility to take reasonable measures to warn about, and to protect against, serious insect-borne disease risk" will not

disincentivize travel, and may even encourage travel, if unnecessary risks can be minimized with little effort and little cost.

3. Avoiding increased litigation. The Court was skeptical that the recognition of a school's duty to warn or protect against a serious insect-borne illness when organizing a trip abroad will lead to increased litigation. The Court noted that cases with similar facts are uncommon. Not many children are seriously injured by insect-borne diseases while abroad on a school trip, especially when appropriate measures are in place. The Court found that this factor supported the imposition of a legal duty to warn students about, and to protect them against, foreseeable insect-borne diseases. The Court emphasized that it was not recognizing a new cause of action, but rather clarifying a "specific aspect of the already well-established general duty of schools to take reasonable measures to ensure safety of the minors whom they have assumed custody."
4. Decision from other jurisdictions. The Court found this last factor to be neutral as no other jurisdiction had an analogous decision.

With respect to the second question, the Court did not find the verdict excessive as a matter of law and the award, which included \$31.5 million of noneconomic damages, did not warrant remittitur. The Court explained that the trial court's decision on damages is entitled to great weight, especially where, as here, the jury and trial court agreed in the determination and there was no allegation that the jury was "prejudiced, incompetent, or otherwise compromised, but only that its verdict was improperly large." The Court noted that the student's physical injuries and psychological effects will probably worsen as she ages, and that the student's injuries were "uniquely cruel."

In light of the Connecticut Supreme Court's decision, all independent schools should review their travel policies and procedures. Some best practices include:

- Due Diligence and Risk Analysis. Schools should research travel plans in advance, including itineraries and accommodations. Schools should review activity risks, environmental risks, safety/security risks, etc. If students are staying with host families, schools should ensure background checks are conducted and living accommodations are satisfactory. In *Hotchkiss*, the trip leaders failed to require the students to take proper precautions against potential mosquito or tick bites, such

as requiring the students to wear protective clothing or utilizing protective insect repellent. The Connecticut Supreme Court stressed that information directed at travelers is freely available on travel pages published by the Center for Disease Control and Prevention (“CDC”) and foreign governments. The Court explained that “when insect-borne diseases present serious risks, they become the subject of government warnings and media attention ... [and] when a particular disease is brought to an individual’s attention, he or she can learn about the disease’s prevalence, the areas in which the disease is endemic, whether there is a vaccine available and, if not, what other measures may be effective to prevent it.” The Court noted that, although the risk of tick-borne encephalitis is remote, the results can be fatal and the measures a school might take to protect its students are minimal (e.g., applying insect repellent or checking a student’s body for ticks). Schools should consider the likelihood and the gravity of potential harm, in addition to the burden of taking adequate precautions. Schools should review the risks identified by the CDC, local governments, the U.S. State Department, and other resources. Such risks are foreseeable risks, and the school must then take appropriate reasonable precautions to address them and to warn parents and students about them.

- **Permission Forms and Releases.** Schools should always have students and parents sign permission forms specifically allowing a student to attend a trip, and a release to protect the school and the school’s employees. In New York, releases from gross negligence are rarely enforceable, but a well-drafted release can serve to protect a school from many other claims. In *Hotchkiss*, the district court excluded the school’s waiver, finding that its language was ambiguous and against public policy under Connecticut law. It is important that permission forms and releases be as detailed and clear as possible, laying out the foreseeable risks. The U.S. State Department and the CDC should be used as resources to identify current risks in particular areas. Additionally, all permission forms should indicate how much supervision by school employees will be provided during the trip and clearly state if students will be unsupervised at any time during the trip.
- **Emergency Procedures.** Schools should review their emergency procedures during trips, especially when travelling abroad. The procedures should be reviewed and updated regularly and, where appropriate, should include procedures specific to the location of the trip. The procedures should specify who has the authority to decide

when there is a crisis and next steps. Emergency protocols should be clearly communicated with faculty, trip supervisors, students and their families. In *Hotchkiss*, it was alleged that the trip leaders had no medical training, did not appreciate the significance of the initial symptoms of the illness, had no protocol for notifying parents and failed to undertake pre-trip planning and make pre-trip arrangements for the transfer back to the United States of students with medical emergencies.

- Schools should contact their insurance providers to ensure they have appropriate coverage for all trips. Some schools purchase kidnap/ransom coverage, for example, if they are travelling to a dangerous area.

The Connecticut Supreme Court emphasized that it is “beyond dispute that, as a general matter, a school having custody of minor children has an obligation to use reasonable care to protect those children from foreseeable harms during school-sponsored activities, including educational trips abroad.” School-sponsored travel always involves some risk. By properly identifying foreseeable risks, communicating those risks, and taking appropriate precautions to address those risks, schools can help protect their students, and minimize liability for negligence claims.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

[1] This figure was reduced to \$41.5 million dollars.

[2] The full decision can be viewed at www.jud.ct.gov/external/supapp/Cases/AROCr/CR326/326CR97.pdf. The case remains on appeal at the U.S. Second Circuit Court of Appeals.

[3] See SRZ’s April 22, 2013 *Alert* at www.srz.com/resources/independent-schools-should-review-student-travel-policies-in.html.

[4] In a concurring opinion, Connecticut Supreme Court Justice Carmen Espinosa encouraged the Court of Appeals to “revisit its legal determination that there was sufficient evidence to support the jury’s finding that the injuries suffered by the plaintiff Cara L. Munn were reasonably foreseeable.” The text of this concurring opinion is available at <https://jud.ct.gov/external/supapp/Cases/AROCr/CR326/326CR97B.pdf>.

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