

# Understanding Hotchkiss:

What happened and  
How it impacts your program

Frances Mock

919-382-9090

[frances@francesmock.com](mailto:frances@francesmock.com)

WRMC 2015

www.nols.edu/wrmc | (800) 710-6657 x3

WRMCMC



OUTWARD  
BOUND



WILDERNESS RISK MANAGEMENT CONFERENCE

This document may not be reproduced  
without the consent of the author 2015

# What do you know?

**WRMIG**



**OUTWARD  
BOUND** SGA

WILDERNESS RISK MANAGEMENT CONFERENCE

[www.nois.edu/wrmc](http://www.nois.edu/wrmc) | (800) 710-6657 x3

This document may not be reproduced  
without the consent of the author 2015

# Why is this case a big deal?

- ▶ \$41.7 million jury verdict
- ▶ Duty to warn/duty to protect
- ▶ First case of TBE in China
- ▶ 8 years of litigation
- ▶ 40 Parties filed amicus briefs
- ▶ Another lawsuit for \$41.7m for Lyme disease

# What do you want to know?

**WRMIG**



**OUTWARD  
BOUND** SGA

WILDERNESS RISK MANAGEMENT CONFERENCE

[www.nois.edu/wrmc](http://www.nois.edu/wrmc) | (800) 710-6657 x3

This document may not be reproduced  
without the consent of the author 2015

# Agenda

- ▶ The facts
- ▶ The lawsuit
- ▶ Outcome of the trial
- ▶ Status of appeal
- ▶ What happens next
- ▶ How it impacts other programs
- ▶ What you should do

# The “Facts” According to whom?

- ▶ Undisputed
- ▶ Munns
- ▶ Hotchkiss
- ▶ Court

# The Facts

- ▶ Cara Munn, 15 year old
- ▶ Hotchkiss School, Connecticut
- ▶ Month-long school trip to China in 2007
- ▶ Field trip to Mt. Panshan in Tianjin, China

# Pre-trip Information and Documentation

- ▶ Medical advice from Hotchkiss
  - ▶ Link to CDC website (but link to South America)
  - ▶ Get independent medical advice.
  - ▶ Suggest they visit a travel clinic. School infirmary could be one but could not offer independent medical advice.
  - ▶ Munns did not seek advice from a doctor.
- ▶ Pack list includes bug spray
- ▶ Forms
  - ▶ Itinerary (not as detailed as could be)
  - ▶ List of risks
  - ▶ Liability release form

# The field trip

- ▶ To Mt. Pan
- ▶ No warning to wear bug spray
- ▶ Insect repellent left on bus
- ▶ Advised to wear long pants but did not insist
- ▶ Walked to top
- ▶ Descent by cable car or hiking
- ▶ Munn and others went off trail
- ▶ Bug bites but no clear tick bite. Had bug bites from other trips.

# Cara's medical condition

- ▶ 10 days later felt ill
- ▶ Flu-like symptoms
- ▶ Condition deteriorated
- ▶ Taken to regional hospital
- ▶ Then airlifted to bigger hospital in Beijing?
- ▶ Parents arrive
- ▶ Transported to New York hospital
- ▶ Diagnosis
  - ▶ CDC “probable” TBE
  - ▶ First American traveler ever to get TBE in China
  - ▶ CDC Advisory two months after trip started about TBE in China

# Cara's current condition

- ▶ Lost ability to speak: uses a translation device by typing
- ▶ Loss of control of face
- ▶ Some cognitive defects
- ▶ Student at highly ranked college, taking full course load
- ▶ Participates in sports (skiing, tennis, bike riding)
- ▶ International travel and journalism

# The lawsuit

- ▶ Filed in federal court in Connecticut
- ▶ Federal court is using Connecticut state law
- ▶ Allegations
  - ▶ Failure to warn
  - ▶ Failure to protect
- ▶ Initial demand is \$13m

# Court invalidates release form

- ▶ Ambiguous
- ▶ Violated public policy
- ▶ Schools responds:
  - ▶ Not a commercial operation
  - ▶ Did not completely absolve the school of responsibility
  - ▶ Will discourage educational trips

“To all who plan on traveling to Mount Pan, I would highly recommend wearing long-sleeved clothing and pants with DEET on them....DO NOT under any circumstances go to Mount Pan and wear shorts and a tank top (as I stupidly did--) without wearing insect spray (as I also stupidly did).”

# Lawsuit progression

- ▶ Discovery
- ▶ Jury trial (March 2013)
  - ▶ Excluded school's expert witness
- ▶ School had duty “to ensure” she used “protective measures”
- ▶ Jury awards \$41.75 m
  - ▶ \$10.25m in past and future medical damages
  - ▶ \$31.5m in pain and suffering
- ▶ Motion after trial to set aside verdict
  - ▶ Legal grounds
  - ▶ Excessive amount

# Trial court's opinion (June 2014)

- ▶ 85 page opinion, issued over a year after trial
- ▶ Strong opinion by judge about responsibility of school
- ▶ Duty to warn
  - ▶ Not based on foreseeability
  - ▶ Decide based on severity of harm
  - ▶ So even if improbable, must warn
- ▶ Duty to protect
  - ▶ Not enough to advise
  - ▶ Must protect
  - ▶ Akin to strict liability
- ▶ Munn was not negligent

# Appeal and amicus briefs

- ▶ Hotchkiss' brief
- ▶ 40 Amici
- ▶ Three amicus briefs
  - ▶ Outdoor Industry
  - ▶ National Association of Independent Schools (NAIS) and 28 others
  - ▶ The Association of Boarding Schools (TABS) and Montessori Teachers' Assoc.

# Hotchkiss's arguments

- ▶ Release was enforceable
- ▶ No proof Munn contracted TBE on Mt. Pan
- ▶ Contracting TBE on Mt. Pan was not reasonably foreseeable
- ▶ School did not have duty to protect her in that circumstance
- ▶ Hotchkiss's expert was improperly excluded while allowing plaintiff's expert who had no expertise with secondary school
- ▶ Improperly advised jury that gravity of the harm affected whether harm is foreseeable
- ▶ Award of \$31,500,000 in noneconomic damages was excessive

# Outdoor industry amici

- ▶ NOLS
- ▶ SCA
- ▶ American Camp Association
- ▶ YMCA Camp Mohawk
- ▶ Broadreach
- ▶ Ecology Project International
- ▶ No Barriers, USA
- ▶ Where There Be Dragons
- ▶ World Leadership School

# Arguments in outdoor industry amicus brief

- ▶ Children should go outside
- ▶ The outdoors has risks
- ▶ Duty owed to children depends on their age
- ▶ No duty to ensure child's safety
- ▶ Excessive warning are not helpful
- ▶ Will encourage litigation
- ▶ Cost and availability of insurance

# Arguments TABS brief

- ▶ TABS (represents 287 boarding schools in US)
- ▶ North American Montessori Teachers' Association (hundreds of schools, thousands of teachers)
- ▶ Parents should be able to choose child's activities and the educational value of being outdoors and being more independent, with less supervision.
- ▶ Trial court is essentially saying parents and organizations are negligent for allowing children to play outside without extensive protection from insects. Must micromanage including clothing choices and warning of common dangers.
- ▶ Most parents in US let kids outside without long pants and bug spray even though have Lyme and other insect borne diseases here.
- ▶ One case in Connecticut where parent found negligent for keeping child indoors bc of excessive fear of Lyme.

# Arguments by NAIS

- ▶ NAIS (represents 1600 independent schools)
- ▶ American Council on Education (ACE) (has 1800 members, mostly colleges and universities)
- ▶ Foreign travel and study abroad are essential to modern education.
  - ▶ Prepare for global economy
  - ▶ National security/foreign policy crises
- ▶ Risk of insect-borne disease was not reasonably foreseeable
  - ▶ Dangerous animals inhabit much of the planet
  - ▶ No local warnings in China
  - ▶ Listing risks for area as large as quarter of China is impracticable
- ▶ Example of impact on field trip in NYC to Central Park
  - ▶ Apply DEET, warn of falling air conditioners, metro doors closing on limbs, horse-drawn carriages, earthquakes

# Decision from Second Circuit (August 2015)

- ▶ Injury was foreseeable
  - ▶ Look to general nature of harm
  - ▶ Even if method is “unusual, bizarre, or unforeseeable”
  - ▶ Not clear what CDC advisory before trip was
- ▶ Certified two questions to Connecticut Supreme Court:
  1. Does public policy support imposing duty to warn about insect-borne diseases for trip abroad?
  2. Was the award of \$41.5 excessive?
- ▶ Other issues to be decided after state decision

## Second Circuit:

“ [I]t is unreasonable to expect a trip organizer to warn students about or protect them against every danger. Field trips are *intended* to expose children to situations outside of their comfort zones and of the organizers’ control...the risk of contracting [TBE} was undeniably remote.”

# Second Circuit

“[I]nternational trips and outdoor activities, while sometimes posing substantial health and safety risks, offer important benefits to their participants.”

*Connecticut statutory law:*

“It shall be the policy of the state to encourage its students, teachers...to participate in international studies, international exchange programs and other activities that advance cultural awareness...”

# Next steps

- ▶ Briefing by Connecticut Supreme Court
- ▶ Oral argument?
- ▶ Ruling
- ▶ Second Circuit review court's opinion and issue its own
- ▶ Could be appealed to U.S. Supreme Court but unlikely
- ▶ Likely to be at least next year before a final resolution

How do you think this will impact other organizations?

**WRMRC**



**OUTWARD  
BOUND**



WILDERNESS RISK MANAGEMENT CONFERENCE

www.nois.edu/wrmc | (800) 710-6657 x3

This document may not be reproduced without the consent of the author 2015

# Impact on the industry

- ▶ Second Circuit recognized the potential impact:
  - ▶ “This case is likely to encourage future victims of unusual accidents on educational trips to seek compensation, placing a heavy financial burden on trip providers.
  - ▶ Imposing a duty here “might discourage field trips that serve important educational goals.”
  - ▶ Trips might be curtailed or ceased completely, “depriving children of valuable opportunities.”
  - ▶ Might result in increased insurance premiums
  - ▶ “The size of this award makes it likely that it will have repercussions far beyond this case and affect the whole industry of educational trips.”
  - ▶ But, may make programs safer.

# Impact on programs

- ▶ Second Circuit is federal appellate court over New York, Connecticut, other states
- ▶ Second Circuit is very influential
  - ▶ Covers New York
  - ▶ One step down from US Supreme Court
- ▶ But, only involves Connecticut law. Not binding on other states.
- ▶ But other states and courts could adopt the reasoning.

# Impact in Connecticut

- ▶ Encouraging litigation: other suit for \$41.7m for Lyme disease contracted at YMCA camp
- ▶ Need insurance to cover that kind of potential loss?
- ▶ Will carriers write it?
- ▶ Can programs afford it?
- ▶ Some may stop offering programs
- ▶ Some may change activities will offer
  - ▶ Give more extensive warnings
  - ▶ Need to be more paternalistic?
- ▶ If not adequately insured, similar jury verdict may put programs out of business

# Impact for orgs outside Connecticut

- ▶ Do you solicit and accept participants from Connecticut?
  - ▶ Likely to be sued in Connecticut
  - ▶ Connecticut law likely to apply
  - ▶ Even if you have a forum selection clause and choice of law clause
- ▶ Other states and courts may adopt law and reasoning

# What should you do?

**WRMIG**



**OUTWARD  
BOUND** SGA

WILDERNESS RISK MANAGEMENT CONFERENCE

www.nois.edu/wrmc | (800) 710-6657 x3

This document may not be reproduced  
without the consent of the author 2015

# Things to consider:

- ▶ Need to better warn?
  - ▶ Include disease carrying insects and animals
  - ▶ Have more inclusive list of risks in your liability release and acknowledgement of risks form?
  - ▶ But undermines effectiveness of acknowledgement of risks
- ▶ Need to better protect participants?
- ▶ Assess your insurance coverage
- ▶ Keep an eye out for similar developments in your state

# Take aways

- ▶ The decision is alarming but we can be hopeful.
- ▶ This is the worst case scenario. Very unusual.
- ▶ Litigation takes a long time.
- ▶ Can be frustrating and feel unfair.
- ▶ Releases are enforceable in most states.
- ▶ Stay focused on running a good program.

# Questions?

**WRMRC**



**OUTWARD  
BOUND**



WILDERNESS RISK MANAGEMENT CONFERENCE

[www.nols.edu/wrmc](http://www.nols.edu/wrmc) | (800) 710-6657 x3

This document may not be reproduced  
without the consent of the author 2015