

Hotchkiss Update:

Where are we now?
What's next?

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What do you know?

Why is this case a big deal?

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

What do you want to know?

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
- ▶ Student at 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. Said school infirmary could be one but it could not offer independent medical advice.
 - ▶ Munns did not seek advice from a doctor.
- ▶ Pack list included 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
- ▶ But no plan to walk thru the woods
- ▶ Walked to top, descent by cable car or hiking on paved trail
- ▶ Against leader direction, 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
- ▶ Parents arrived
- ▶ Transported to New York hospital
- ▶ Diagnosis
 - ▶ CDC “probable” TBE (one year later)
 - ▶ First American traveler ever to get TBE in China
 - ▶ CDC Advisory about TBE in China (two months after trip?)

Cara's current condition

- ▶ Lost ability to speak: uses a translation device
- ▶ Loss of control of face
- ▶ Some cognitive defects
- ▶ Graduated from highly ranked college
- ▶ Participates in sports (skiing, tennis, bike riding)
- ▶ International travel and journalism
- ▶ Works as marketing research intern - NY

The lawsuit

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

Court invalidates release form

- ▶ Ambiguous
- ▶ Violated public policy
- ▶ School's response:
 - ▶ Not a commercial operation
 - ▶ Form did not completely absolve the school of responsibility
 - ▶ Will discourage educational trips

Cara Munn:

“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
- ▶ Verdict: school had duty to warn and "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 or for new trial
 - ▶ Numerous 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
- ▶ Found Munn was not negligent

“Perfect Storm”

- ▶ Connecticut law
 - ▶ Rarely (if ever) enforces Release
 - ▶ Enforces Parental Immunity
 - ▶ No cap on non-economic damages
- ▶ Court holdings:
 - ▶ No contributory negligence by Cara Munn
 - ▶ Struck Hotchkiss expert on duty/foreseeability
 - ▶ Post trip CDC reports used to support Hotchkiss’s pre-trip knowledge of TBE

Appeal and amicus briefs

- ▶ Hotchkiss' brief
- ▶ 40 Amici
- ▶ Three amicus briefs
 - ▶ Outdoor Industry
 - ▶ National Association of Independent Schools (NAIS) and 28 others (1600 schools)
 - ▶ The Association of Boarding Schools (TABS) and Montessori Teachers' Assoc. (287 schools)

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 warn or protect her in that circumstance
- ▶ Hotchkiss's expert improperly excluded and CDC website evidence misconstrued; plaintiff's expert allowed - no secondary school expertise
- ▶ 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
- ▶ Outward Bound
- ▶ 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
- ▶ Assume inherent risks; no duty re: obvious risks
- ▶ Duty owed to child - depends on age
- ▶ No duty to warn of remote risks
- ▶ No duty to ensure child's safety
- ▶ Excessive warning are not helpful
- ▶ Will encourage litigation
- ▶ Cost and availability of insurance

Arguments other amicus briefs

- ▶ Most parents in US let kids outside without long pants/bug spray even though Lyme and other serious insect borne diseases present.
- ▶ CT case - parent found negligent for keeping child indoors bc of excessive fear of Lyme.
- ▶ Example: impact on NYC field trip 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)

- ▶ Agrees that injury was foreseeable, BUT states: **“Here, the risk of contracting TBE was undeniably remote...no one would have expected that Munn would contract TBE.”**
- ▶ Connecticut construes foreseeability “broadly”
- ▶ Not clear what CDC advisory was before trip, but denied intro of key pre-trip CDC report
- ▶ Certified two questions to CT Supreme Court before issue final ruling:
 1. Does public policy support imposing duty to warn about insect-borne diseases for trip abroad?
 2. Was the award of \$41.5 excessive?

Connecticut Supreme Court (opinion 8/11/17)

- ▶ Answered two questions:
 - ▶ Public policy does not prevent enforcement of duty in this case.
 - ▶ Jury verdict was not excessive.
- ▶ “Remoteness” of risk goes to duty/foreseeability, not public policy. Court cannot consider.

Espinosa Concurring Opinion

- ▶ Did the Second Circuit get it wrong?
- ▶ Justice Espinosa thinks so - and she did her homework!
- ▶ Reviewed excluded CDC record pre-during-post trip - scolded court for failing to consider!

Espinosa

- ▶ Surprising, blunt, and helpful
- ▶ **Advocating for the 2nd Circuit to:**
 - ▶ reconsider whether evidence sufficient to support verdict that Munn's injuries were foreseeable
 - ▶ find court's failure to take "judicial notice" of pre-trip CDC report or "way back machine" (reflecting no TBE in China) was error
 - ▶ set aside the jury verdict

Espinosa

- ▶ CDC: Risk of contracting TBE was miniscule (“lower even than her chance of being struck and killed by a meteorite”), so no reasonable basis for jury’s finding.
- ▶ “There simply was no basis...on which a jury reasonably could have concluded that it was *likely* or *probable* that the plaintiff would contract TBE”
- ▶ “Indeed, I am not aware of a single case in any jurisdiction in which a risk that was as quantifiably improbable as this was deemed to be reasonably foreseeable.”

Espinosa

- ▶ It is a waste of time for schools and other organizations to warn of remote risks - teenagers will pay no attention.
- ▶ ‘Ensure’ protective measures - impossible.
- ▶ “It is difficult enough to get teenagers to wear long pants and long sleeved shirts in March or November, let alone in the heat of the summer. To force them to swap out their shorts and tank tops for jeans and turtlenecks, merely to protect against diseases that were virtually unknown at Mt. Pan and that no tourist had ever contracted, strikes me as both unreasonable and unrealistic.”

Espinosa

- ▶ There is value in getting kids outdoors - this ruling will have catastrophic results.
- ▶ Notes the 3 Amici briefs!! The industry understands the magnitude of potential adverse impacts.

Next steps

Second Circuit will now return to review additional issues (evidence, jury finding, etc.) and render its final decision.

Briefing is complete.

Possible rulings from Second Circuit

- ▶ How will Court react to Espinosa's road map?

Could:

- ▶ Rule Munn's injuries were unforeseeable and reverse the jury verdict, enter judgment for Hotchkiss
- ▶ Find Hotchkiss expert testimony wrongly excluded and order a new trial on all issues
- ▶ Affirm the jury verdict
- ▶ Could be appealed to U.S. Supreme Court but unlikely
- ▶ Likely to be at least next year before a final resolution

How does this impact us?

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.”

Impact on programs

- ▶ Second Circuit is federal appellate court over New York, Connecticut, and Vermont
- ▶ 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

- ▶ Controlling law for you. High bar.
- ▶ 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
 - ▶ 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 may 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?

Take Aways (things to consider/do):

- ▶ Need to better warn?
 - ▶ Include disease carrying animals/insects
 - ▶ Use “including but not limited to” language in list of risks
 - ▶ Have tricked out comprehensive list of risks? - may undermines effectiveness
- ▶ Need to better ‘protect’? Slippery slope
- ▶ Assess your insurance coverage
- ▶ Keep an eye out for similar developments in your state

Take Aways

Things to consider/do:

- ▶ Consider/clarify student and parent responsibilities:
 - ▶ (e.g.) they should conduct an independent investigation of risks.
- ▶ Student:
 - ▶ share in responsibility for own well being
 - ▶ be active player in risk management equation
- ▶ Document research—what you knew when from what source
- ▶ Consult legal counsel - understand relevant state laws and legal doctrines.

Put this in perspective

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

Perspective

- ▶ Consider the overall warnings and information in your participant agreement and other program materials in light of the nature (and location) of your programs
- ▶ Don't over-focus JUST on this risk (insect borne disease)
- ▶ Put in larger context - value in recognizing and managing risks across the span of your programs.

Questions?