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# Liability for field trips: Munn v. Hotchkiss and ticks, Costa v. Plainville and basketball, and are there really any new obligations for public schools?

## Education Law Notes

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Last Friday (August 11, 2017), the Connecticut Supreme Court issued a decision garnering significant press attention in which it ruled that 1) Connecticut public policy imposes a duty upon schools to warn or protect against the risk of serious insect-borne disease when organizing trips abroad, and 2) a $41.5 million jury verdict with respect to a breach of that duty was not so outrageous as to require reduction. Less covered was a decision by the Connecticut Appellate Court issued officially on August 15, 2017 involving the dismissal of a case against a public school district for injuries suffered by a student during a class picnic. So what does this all mean for schools trying to safely organize a trip (and avoid liability)?

*Munn v. Hotchkiss*: Cara Munn, then a 15 year-old freshman student at the Hotchkiss School, participated in a summer program in China organized by Hotchkiss. The school had sent parents a packet outlining activities and containing legal forms for student participants and parents to waive claims against the school. Hotchkiss provided medical advice for the trip, including a link to a Center for Disease Control and Prevention ("CDC") webpage and a note that the school's infirmary could "serve as a travel clinic." However, the webpage linked to the CDC's Central America site instead of its China site, and the infirmary was unable to provide independent medical advice. Finally, the school sent an itinerary, packing list, and handbook on international travel. The packing list mentioned bug spray in its "miscellaneous" category, but included no warning about insect-borne diseases in the section where other health risks were mentioned.

While on the trip, the students went to Mt. Panshan, a forested mountain. No warnings to wear bug spray were given; indeed, the trip leader left her bug spray on the bus. After hiking to the top of the mountain, a small group of students (including Munn) decided to hike down, while others took a cable car. The trip leader pointed them to a paved path and said that she would wait for them at the bottom. The students decided to leave this path and follow narrow dirt trails instead; the students got lost and walked among trees and through brush. Munn suffered many insect bites and an itchy welt on her left arm. Ten days later, she awoke with a headache, a fever, and wooziness, and her condition deteriorated rapidly. Munn was diagnosed with tick-borne encephalitis ("TBE"), a viral infectious disease which affects the central nervous system. As a result, Munn lost the ability to speak and has difficulty controlling her facial muscles, causing her to drool. Munn has also lost some cognitive function, particularly in terms of reading comprehension and math.

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Munn and her parents filed a lawsuit in federal court against Hotchkiss, alleging that Hotchkiss was negligent in failing to 1) warn the Munns about the risks of viral encephalitis; and 2) provide for proper protective clothing, insect repellent, or vaccinations. Hotchkiss asserted a number of defenses, including that the Munns assumed the risk by signing the school's "Agreement, Waiver, and Release of Liability." However, the court excluded the waiver, finding that its language was ambiguous and that it was against public policy under Connecticut law. Thereafter, the jury found that Hotchkiss was negligent in failing to warn Munn of the risk of serious insect-borne illnesses and ensure that she took protective measures. The jury rejected a claim that Munn was "contributorily negligent" and awarded her over $10 million in past and future economic damages, and $31.5 million in non-economic damages.

Hotchkiss appealed and the Second Circuit of the U.S. Court of Appeals held that the evidence was sufficient to support the jury finding that the student's TBE was "foreseeable" (the first part of determining if there is a legal duty of care), but "certified to" and sought the direction of the Connecticut Supreme Court as to the following questions: 1) whether Connecticut public policy supported imposing a duty on a school to warn about or protect against the risk of serious insect-borne diseases when organizing a trip abroad, and 2) whether the damages award was excessive. In ruling that such a duty existed, the Supreme Court noted the special relationship between the schools and their students, in light of the schools taking custody of students. The Court found that a school's duty may exist not only during classes, but during school-sponsored activities. The Court noted that the schools' duty will vary based upon the particular risk at issue (along with the age of the participants and other attendant circumstances). In terms of whether "public policy" favored the imposition of a duty here, the Court noted that generally when insect-borne diseases present serious risks, they become the subject of governmental warnings and media attention, which can then lead to an individual assessing the risk and taking protective measures that are readily available. As such, the Court ruled that the normal expectations for a school sponsored trip abroad would be that the trip organizer take reasonable measure to warn about serious insect borne diseases and take reasonable measures to protect the students. The Court rejected a claim that the imposition of such a duty upon schools would have a chilling effect upon school trips, opining that the elimination of unnecessary risks (that could be minimized with little effort) would actually encourage enthusiasm for traveling abroad. The Court also rejected a claim that this imposition of a duty would open the floodgates of litigation, since schools facing litigation could still 1) defend the reasonableness of their actions, 2) challenge the connection between their actions and any injuries suffered, and 3) in the public school context, assert the governmental immunity defense. The Court rejected Hotchkiss' claim that there should have been no duty imposed upon it due to the remoteness of Munn contracting TBE, noting that the rareness of the harm must be weighed against the gravity of the harm if suffered. Finally, the Court rejected Hotchkiss' attempt to challenge the amount of damages, in light of the discretion normally given to juries. Based upon the Supreme Court's guidance, the case will now return to and be decided by the Second Circuit. In the meantime ...

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*Costa v. Plainville Board of Education*: Plainville High School conducted its annual senior class picnic during regular school hours, but off campus at a YMCA campground facility with a softball field, basketball court, and swimming pool. Students were not obligated to go to the picnic, but Ricky Costa (a student) voluntarily attended and participated in a pick-up basketball game in which he was injured when another player poked him in the eye while they were attempting to get the ball. Plainville personnel generally supervised the picnic, but none of them were stationed near or monitoring the basketball court. No behavioral issues or basketball related injuries had occurred at senior class picnics in prior years. Plainville had in place a supervision policy that broadly provided that school sponsored activities "must be well-planned and organized and must provide for the adequate supervision and welfare of participating students at all times."

Costa and his parents brought a lawsuit in state court, alleging that Plainville and its personnel were negligent. Plainville asserted that these negligence claims were barred by "governmental immunity". The trial court agreed, ruling that Plainville's action involved a "discretionary duty" for which they were entitled to governmental immunity.

On appeal, the Appellate Court ruled that the trial court properly determined that Plainville's alleged negligent acts or omissions were discretionary in nature (i.e., acts for which the school is to exercise judgment and discretion in providing adequate supervision) and were not ministerial acts (i.e., acts for which the law prescribes a particular action or response by schools to specific conditions). The Court rejected Costa's reliance upon general safety guidelines and school policies that, while requiring adequate supervision of students, did not prescribe the precise nature of such supervision or the manner in which it should be carried out. The Court also ruled that the "identifiable person-imminent harm" exception to discretionary act immunity was not applicable. This exception applies only if the circumstances make it apparent to a public official that a failure to act would likely subject an "identifiable person" to "imminent harm." While recognizing schoolchildren who are on school property during school hours are an identifiable class of foreseeable victims, the Court held that school children who *voluntarily* participate in non-mandatory school sponsored activities do not fall within such an identifiable class. The Court relied upon its prior decision in *Jahn v. Board of Education*, 152 Conn. App. 652 (2014), where a student who was injured during an extracurricular swim meet did not qualify as an identifiable victim. Similarly, Costa was not required to attend the senior picnic, but did so voluntarily, and he also voluntarily participated in the pick-up basketball game in which he was injured; the Court held that Costa's voluntary participation did not grant him the status of an identifiable person entitled to protection by school officials.

***Are these cases consistent and what does this all mean?*** What has been forgotten in the hullabaloo about Munn is that the case involved a **private** school, which could **not** assert governmental immunity. It is possible that if Munn's trip took placed in the public school environment, the case outcome would have been different. Thus, while instructive, Munn may not represent a huge sea change for public schools.

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Nevertheless, governmental immunity is sometimes a nebulous area of the law, and it is not the best strategy for school districts to hope to be saved by the courts. Schools should act with reasonable prudence (**especially for foreign travel**, which may be inherently more dangerous), and contact the CDC and the State Department for up-to-date information about the dangers of visiting locations abroad. Parents should be given access to such information (with proper links). While a waiver may not be a complete "get out of jail free" card for schools, it could (if properly drafted) at least serve as a tool for warning the parents of the dangers of travel abroad in general and the specific location to be visited, and better position a school to better defend its actions. Finally, the Munn verdict may serve as a reminder for schools to review periodically the extent of their liability insurance coverage and assess the desirability of possibly increasing it (or obtaining umbrella coverage).

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