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Outside Counsel

# Providing Student Travel Programs: Risky Business

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Schools, travel agencies and other organizations often promote and/or supervise student travel programs, some of which may feature credit for courses taken at foreign universities or guided tours of historically and culturally significant locales,<sup>1</sup> while others are, primarily, social events<sup>2</sup> or religious missions<sup>3</sup> or confidence-building remote wilderness expeditions.<sup>14</sup> On occasion a student participant may be killed or suffer serious physical injuries. Cases have examined topics including: (1) the incidence of infectious diseases in the destination country<sup>5</sup>; (2) requested and needed medical assistance;<sup>6</sup> (3) the dangers of recreational activities such as swimming<sup>7</sup> or strenuous hiking<sup>8</sup>; and (4) supervision of students and intervention to prevent the excessive use of alcohol<sup>9</sup> and drugs.

## Summer Program in China

In [Munn v. The Hotchkiss School](#),<sup>10</sup> a boarding school student, Cara Munn, participated in a summer program trip to China and contracted tick-borne encephalitis (TBE) resulting in serious injuries to her brain. After a seven-day trial the jury found The Hotchkiss School, based in Connecticut, solely liable and awarded \$10.25 million in past and future economic damages and \$31.5 million in non-economic damages,<sup>11</sup> the total award being reduced by the trial court to approximately \$41.5 million.

Because this was a school-sponsored tour led by school employees, the standard of care was heightened under Connecticut common law. As noted by the U.S. District Court for the District of Connecticut, the school "undoubtedly owed Munn, a minor child in its care, a duty to protect her from known threats to her health and safety during the 2007 China summer program trip. Every public school shares this common-sense duty to protect the health and safety of students in its care...but this duty may be heightened for boarding schools, institutions that accept responsibility for students' well being (standing in loco parentis)...Further a boarding school may create a legal duty by its representations to students and their parents/guardians, particularly in the provision of health services."

The jury found that the school ignored and failed to warn of a predictable and preventable risk to Munn. There were two CDC (Centers for Disease Control) advisories warning of several insect-borne diseases in China. The first advisory warned of malaria in "some areas of China" and that "dengue, filariasis, Japanese encephalitis, leishmaniassis and plague are diseases carried by insects...in this region." This advisory recommended that travelers bring "insect

repellant containing DEET" and "long-sleeved shirts and long pants." The second advisory noted that visitors to China should be aware of the existence of tick-borne encephalitis, which "occurs in forested regions in northeastern China" and that "travelers should use DEET-based bug repellant and wear long pants and long sleeves when outdoors."

The Munn case is on appeal before the U.S. Court of Appeals for the Second Circuit where the court noted<sup>12</sup> that although it agreed that there is sufficient evidence for the jury to have found Munn's illness foreseeable, "we are unable to determine whether public policy supports imposing a legal duty on Hotchkiss. This case implicates important and unresolved issues of Connecticut state law and public policy."

The court decided to certify two questions to the Connecticut Supreme Court to include "Does Connecticut public policy support imposing a duty on a school to warn about or protect against the risk of a serious insect-borne disease when it organizes a trip abroad?" and "If so, does an award of approximately \$41.5 million in favor of the plaintiffs, \$31.5 million of which are non-economic damages, warrant remittitur?"

## Semester Off In Israel

In *Katz v. United Synagogue of Conservative Judaism*<sup>13</sup> the plaintiff, a 19-year-old student with limited knowledge of Hebrew, suffered a knee injury during a study-abroad program in Israel. At the time she was living in a small town in southern Israel and was provided with counselors to assist in the provision of, inter alia, medical care. The plaintiff alleged that "when physical therapy was prescribed for her knee injury, defendant refused to arrange for such treatment and, as a result, her recovery was delayed and compromised."

In determining whether or not defendant owed plaintiff a duty of care requiring the provision of needed medical treatment in Israel, the Appellate Division, First Department, noted that the parties' relationship may create a duty where it "places the defendant in the best position to protect against the risk of harm." The court distinguished an "ordinary college or study abroad program" from the subject program taking place in a remote town, Yerucham, in the Negev desert which involved volunteering and was supervised by counselors who did "[p]retty much everything" including responding to medical issues. "Under the circumstances, defendant exercised a sufficient degree of control over the program to create a duty of care to plaintiff."

The court also noted that "it was foreseeable that the failure to arrange for prescribed care could compromise recovery." The court went on to note that defendant maintained that, even if it owed plaintiff a duty, that duty was not breached because the program took plaintiff for medical treatment and follow[ed] the general recommendations of the doctors who examined plaintiff. However, the court held that "[t]his argument ignores the fact that plaintiff was prescribed physical therapy, which was not provided," wrote the court.

The majority in the Katz case affirmed the denial of defendant's motion to dismiss the complaint on the grounds of no duty and no proximate cause finding, at least, at the summary judgment stage, a sufficient basis for both.

## A Risky Semester In India

In *Brenner v. National Outdoor Leadership School*,<sup>14</sup> a student, Thomas Levi Plotkin, presumably drowned during a semester in India program featuring a remote wilderness expedition in the Himalayas organized by the National Outdoor Leadership School (NOLS) whose mission statement asserted, inter alia, that "We accept risk as an integral part of the learning process and of the environments through which we travel. The recognition and

management of risk is critical to both the development of leadership and to the safety and health of our students and staff."

After arriving in India and preparing for the 30-day backpacking portion of the "leadership" course, the students hiked 41 miles up a valley following the Gori Ganga River. "The trail to Lilam required students to cross waterfalls, travel on a steep ridge overlooking the Gori Ganga River, and navigate around washed-out paths and landslides...As they hiked the rain was continuous and the trail had become slippery." While hiking on a slippery trail Plotkin "fell backwards and head first off the trail and down the steep incline...The ground search for his body continued until October 6, when the search was ended. Plotkin's body was never found."

The Brenner complaint, brought by Plotkin's family, asserted three causes of action—negligence, gross negligence and willful and wanton negligence. In terms of negligence, the plaintiffs alleged failure to exercise reasonable care in the planning, management, instruction and supervision of its program, to wit, providing adequate instruction prior to allowing participants to backpack to remote locations without being accompanied by a course instructor; providing adequate nutrition and caloric intake; supervising participants in a safe and reasonable manner; establishing policies and procedures to avoid unnecessary risk and protect the safety of participants; ensuring the immediate availability of emergency rescue equipment in remote locations; and promptly requesting assistance from local residents and officials in an emergency situation.

The district court in Wyoming recognized that the allegations might reflect "serious errors or lapses in judgment, which may have demonstrated that the defendant may have acted negligently." Ultimately, however, the court held that the enforceable release in the Student Agreement precluded the plaintiff from proceeding on any negligence claim. Before participating in the NOLS program Plotkin was required to sign a Student Agreement which, inter alia, (1) identified the activities and risks involved in the program, (2) set forth an Acknowledgment and Assumption of Inherent and Other Risks (3) included the Agreements of Release and Indemnity and (4) enumerated a "non-exclusive list of inherent risks of NOLS activities, including...delays in communication and transportation to medical facilities, equipment failures, travel on rugged trails and terrain, including rivers, rapids, river crossing, steep slopes, slippery rocks and various environmental risks and hazards."

## Conclusion

Student tours can provide beneficial educational experiences for young people. However, schools and cooperating tour operators need to be, particularly, careful in planning, arranging and executing these tours.

### Endnotes:

1. *Munn v. Hotchkiss School*, 933 F.Supp.2d 343 (D. Conn. 2013); *Munn v. Hotchkiss School*, 24 F.Supp.3d 155 (D. Conn. 2014), aff'd in part and questions certified, *Munn v. Hotchkiss School*, 795 F.3d 324 (2d Cir. 2015).
2. *Mauer v. Cerkvnik-Anderson Travel*, 181 Ariz. 294, 890 P. 2d 69 (1994); *Knoell v. Cerkvnik-Anderson Travel*, 181 Ariz. 394, 891 P.2d 861 (1994) (student falls to his death from hotel balcony after consuming alcohol for three days).
3. *Been v. Seventh Day Adventist Church*, 304 F.Supp.2d 716 (D. Md. 2004).
4. *Brenner v. National Outdoor Leadership School (NOLS)*, Case No: 14-CV-130-J (D. Wyo.), Decision (Oct. 9, 2015). See also: *Brenner v. National Outdoor Leadership School*, 20 F.Supp.3d 709 ( D. Minn. 2014)(Wyoming forum selection cause enforced; case transferred to

District of Wyoming).

5. *Munn v. Hotchkiss School*, 24 F.Supp.3d 155 (D. Conn. 2014), aff'd in part and questions certified, *Munn v. Hotchkiss School*, 795 F.3d 324 (2d Cir. 2015).

6. *Katz v. United Synagogue of Conservative Judaism*, 2016 NY Slip Op 00094, 2016 WL 115962 (1st Dept. 2016).

7. See *Thackurdeen v. Duke University*, 2015 WL 5155890 (S.D.N.Y. 2015) (student drowns off the coast of Costa Rica during Organization of Tropical Studies research program); *Tongier v. EF Institute For Cultural Exchange*, 2011 WL 7090713 (Mass. Super. 2011) (student drowns off coast of Costa Rica); *Been v. Seventh Day Adventist Church*, 304 F.Supp.2d 716 (D. Md. 2004)(swimming pool accident at Bible camp); *Johnson v. New River Scenic Whitewater Tours*, 313 F.Supp.2d 621 (S.D.W.Va 2004)(during Fort Johnson Baptist Church sponsored mission to West Virginia young person drowns whitewater rafting); *Rodriquez v. Class Travel Worldwide*, 2000 U.S. Dist. LEXIS 1926 (E.D. La. 2000) (student playfully shoved into pool and rendered quadraplegic); *Gyenes v. Zionist Organization of America*, NYLJ, Aug. 9, 1989 (N.Y. Sup.)(student drowns in Jordan River).

8. *Brenner v. National Outdoor Leadership School (NOLS)*, Case No: 14-CV-130-J (D. Wyo.), Decision (Oct. 9, 2015) (student killed during remote wilderness expedition in Himalayas in India). See also: *Brenner v. National Outdoor Leadership School*, 20 F.Supp.3d 709 ( D. Minn. 2014) (Wyoming forum selection clause enforced; case transferred to District of Wyoming).

9. *Mauer v. Cerkvnik-Anderson Travel*, 181 Ariz. 294, 890 P. 2d 69 (1994)(during a student tour to Mazatlan one of the students fell to her death while on a "party" train provided by the tour operator; "Molly was the fourth student to die by falling from a moving train on a student tour to Mazatlan organized by [tour operator]. Three other students had died previously, albeit the particular circumstances of each incident varied. The students on Molly's tour were not informed of these prior incidents"); *Knoell v. Cerkvnik-Anderson Travel*, 181 Ariz. 394, 891 P.2d 861 (1994) (student falls to his death from hotel balcony consuming alcohol for three days).

10. *Munn v. Hotchkiss School*, 933 F.Supp.2d 343 (D. Conn. 2013); *Munn v. Hotchkiss School*, 24 F.Supp.3d 155 (D. Conn. 2014), aff'd in part and questions certified, *Munn v. Hotchkiss School*, 795 F.3d 324 (2d Cir. 2015).

11. *Munn v. Hotchkiss School*, 24 F.Supp.3d 155 (D. Conn. 2014), aff'd in part and questions certified, *Munn v. Hotchkiss School*, 795 F.3d 324 (2d Cir. 2015).

12. *Munn v. Hotchkiss School*, 795 F.3d 324 (2d Cir. 2015).

13. *Katz v. United Synagogue of Conservative Judaism*, 2016 NY Slip Op 00094, 2016 WL 115962 (1st Dept. 2016).

14. *Brenner v. National Outdoor Leadership School (NOLS)*, Case No: 14-CV-130-J (D. Wyo.), Decision (Oct. 9, 2015). See also: *Brenner v. National Outdoor Leadership School*, 20 F.Supp.3d 709 (D. Minn. 2014)(Wyoming forum selection clause enforced; case transferred to District of Wyoming).

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