Negligence Liability of Higher Education Institutions regarding Study Abroad

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Introduction

Study abroad (or education abroad) is becoming more and more common these days. Most people in higher education institutions, especially international educators, acknowledge the importance of study abroad. Global experience would not only give students “the global education that is necessary . . . to thrive in the 21st Century economy” (NAFSA, n.d.) but also “promote[] intellectual growth” (Brief for Appellant, Munn v. Hotchkiss School, 2015, p. 4). However, study abroad programs sometimes cause serious accidents and universities have a certain amount of risk of being sued by student participants and/or their guardians, where appropriate, once an accident happens. This risk would discourage universities from promoting study abroad, which would lead a great loss for not only students but also the country. Through examining relevant cases, this paper would like to reveal the effectiveness of the public policy theory in negligence cases, which would exempt universities from tort liability in order to promote a particular public policy (in this case, the importance of study abroad). This theory would be a great ease for universities in promoting international activities and thus it should be accepted widely.

Study Abroad and Liability

Study abroad programs sometimes cause serious accidents such as endemic diseases (and often with incompetent medical facilities), which often do not happen in domestic activities, let alone classroom situations. Because universities often sponsor, support, or encourage study abroad opportunities conducted by themselves or by other entities, they have a certain amount of risk of being sued by student participants, their parents, and their guardians, once an accident happens. Even though many universities have dealt with such risks by various means such as
providing lots of information in advance and contracting with outside medical and security services, the risk becomes more serious as more students participate in study abroad programs. Considering the importance of study abroad programs in higher education, universities should be exempted from a certain amount of risk in order to further promote study abroad. *Munn v. Hotchkiss School* (2015) has made this concern real.

**Munn v. Hotchkiss School**

In order to provide context for the issue, this paper first examines *Munn v. Hotchkiss School*. Although this case is still pending in court, the interim decision by the U.S. Court of Appeals for the Second Circuit to certify questions to the Supreme Court of Connecticut gives us enough context.

**Brief Description**

Cara Munn, then a fifteen-year-old student at the Hotchkiss School (Hotchkiss), a private boarding school at Connecticut, got seriously injured in China because of a very rare disease of tick-borne encephalitis during a school-organized summer program. Munn and her parents sued Hotchkiss and the jury at the U.S. District Court for the District of Connecticut found Hotchkiss solely liable and awarded $10.25 million in economic damages and $31.5 million in non-economic damages against Hotchkiss. Although this is the case in a high school, many inter-university organizations including the American Council of Education (ACE) and the Association of American Universities participated in the amicus brief for the appeal by Hotchkiss in the Second Circuit, because the decision could require very large amount of liability to higher education institutions as well and thus study abroad opportunities could largely decrease.

So far, the Second Circuit asked the Supreme Court of Connecticut to determine if “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” (*Munn v. Hotchkiss School*, 2015, p. 25-26).

**Facts**

According to the courts’ findings, Hotchkiss obtained a set of legal forms for the participants and parents to waive legal claims against Hotchkiss. Hotchkiss also provided medical advice for the trip including a webpage link to the Centers for Disease Control and Prevention (CDC) and the advice stated that the school’s infirmary could serve as a travel clinic. However, the link was connected to CDC’s Central America site instead of China site, and the infirmary did not provide personal medical advice. No warning about insect-borne disease was mentioned. On June 23, 2007, the students went to the Great Wall and to Mt. Pan. After hiking to the top of the mountain, a group of a few students including Munn decided to hike down, while others took a cable car. The students decided to follow narrow dirt trails instead of a paved path, which a chaperon pointed to, and they walked among trees and through brush, which made Munn have many insect bites. Ten days later, she awoke with a headache, a fever, and wooziness. Her condition got worse rapidly and she was taken to a local hospital. Then she was transferred to a Beijing hospital, later airlifted back to New York. She was diagnosed with tick-borne encephalitis and she lost the ability to speak and some cognitive function, while she has managed to live a functional life and attended a college after finishing high school (*Munn v. Hotchkiss School*, 2015).

**Arguments of Each Party**

Munn and her parents filed a lawsuit against Hotchkiss on June 11, 2009. They alleged that Hotchkiss was negligent in failing to warn them the risks of the disease and in failing to provide for proper protective means.
Hotchkiss argued that the Munns assumed the risk by signing the set of legal forms. On appeal, Hotchkiss argued that it did not have a legal duty to warn about or protect against the disease and that $41.5 million jury award is excessive. Its reasoning of not having a legal duty was based on the unforeseeability of the rare disease and a public policy issue. Hotchkiss argued that imposing a legal duty to warn or protect in this case contravenes Connecticut public policy (Munn v. Hotchkiss School, 2015).

Court’s Decision

The district court excluded the waiver of liability by the legal forms because the language was ambiguous and it was against public policy under Connecticut law. The jury found Hotchkiss solely liable and found no contributory negligence on the part of Munn.

The Second Circuit disagreed with Hotchkiss in the foreseeability. The court cited a few Connecticut cases and decided “Connecticut decisions construe foreseeability broadly” (Munn v. Hotchkiss School, 2015, p. 10) although the court also stated that “no one could have expected that Munn would contract [the disease]” (Munn v. Hotchkiss School, 2015, p. 16). On the other hand, the court found both party presented valid arguments regarding the public policy issue. As “Connecticut precedent does not offer sufficient guidance on whether public policy supports imposing a duty on Hotchkiss” (Munn v. Hotchkiss School, 2015, p. 12), the court certified the question to the Supreme Court of Connecticut. Currently, the Supreme Court of Connecticut is examining the question.

Examination of the Amicus Brief

National Association of Independent Schools, ACE, and 27 other education associations submitted an amicus brief in supporting Hotchkiss to the Second Circuit (Brief for Appellant, Munn v. Hotchkiss School, 2015). After emphasizing the importance of school-sponsored
foreign travel and study, the brief argues that the district court erred as a matter of law in finding a duty, regarding a foreseeability of risk and the public policy theory. The brief seems valid to the court especially in the public policy theory because the Second Circuit used the framework of this brief in the decision.

**Foreseeability of risk.**

The brief argues that Hotchkiss was not able to foresee risk from insect-borne disease on or around Mt. Pan. The district court determined it was foreseeable relying on a CDC alert issued after the accident (however, Hotchkiss’s Director of International Programs testified that he had seen a warning about the disease before the trip and the court relied on this testimony (Munn v. Hotchkiss School, 2015)). Furthermore, had the alert been issued before the trip, it is still far too general to foresee the risk, according to decisions regarding cases of Connecticut and Arkansas.

**Public policy theory.**

In referring the four factors which guide the public policy analysis, the brief points out that public policy bars imposition of duty. In Murillo v. Seymour Ambulance Association, Inc. (2003), the Supreme Court of Connecticut stated as follows:

We previously have recognized four factors to be considered in determining the extent of a legal duty as a matter of public policy: (1) the normal expectations of the participants in the activity under review; (2) the public policy of encouraging participation in the activity, while weighing the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions. (citations omitted)

The brief argues that all four factors support the waiver of duty in this case. It further extends its argument by showing the hypothetical example of a class trip to New York City in order to reveal the impracticality of providing all possible risks. According to the brief, the participants would
need DEET to walk on the Fifth Avenue because of the concern on West Nile Virus infection, based on the district court’s understanding of duty.

**Negligence and Public Policy Theory**

Probably the most common tort liability cases in study abroad would be negligence as in *Munn v. Hotchkiss School*. The elements of negligence are: (1) a duty to protect others against unreasonable risks; (2) a failure to exercise standard of care; (3) the conduct of the actor must be the proximate cause of the injury; (4) an existence of injury, actual loss, or damage from the act (Alexander & Alexander, 2011; Garces, 2016). In *Munn v. Hotchkiss*, there was no argument in existence of (3) and (4), while Hotchkiss argues (1) and (2). In addition, courts consider several factors including the foreseeability of the harm and the policy interest in determining if a duty exists (Garces, 2016). As described in the previous chapter, these two factors, especially the latter one, are the focuses in this case. This paper would like to focus on the latter one, as it has broader scope and thus it would have more important implication.

Courts sometimes use public policy as a rationale of exempting a person or an organization from tort liability (Alexander & Alexander, 2011). This public policy theory allows the courts to realize equity in the absence of particular applicable law. *Munn v. Hotchkiss School* is one of the particular examples that applicability of this policy is being argued.

**Munn v. Hotchkiss School**

The Second Circuit stated that “Under Connecticut law, foreseeability of harm alone is not determinative of duties in tort and the imposition of a duty of care also implicates questions of public policy” (*Munn v. Hotchkiss School*, 2015, p. 13). By citing two cases which the Supreme Court of Connecticut has overturned jury verdicts because of public policy, the court showed
there are cases which public policy prevails individual’s interest at least in the field of competitive sports.

Cases . . . indicate that courts place a high value on recreational activities for children, even if they sometimes create safety concerns. Although the present case does not involve competitive sports, it also implicates important questions of public policy because of the benefits of educational trips for children. (*Munn v. Hotchkiss School*, 2015, p. 15)

In addition, the court found four factors to determine an existence of duty which Connecticut courts use (the same four factors as the brief referred to, but different citation). In this point, the court applied the factors as follows: (1) warning students about or protecting them against every danger is unreasonable; (2) international trips offer important benefits to their participants and such benefits are expressed in Connecticut statutory law (Conn. Gen. Stat. § 10-27(a)), while the host organization must guard its minor participants; (3) the case is likely to increase further litigations, which could also encourage careful preparations by trip providers; (4) courts in other states have declined to impose a duty in similar cases. The Second Circuit seems to accept the framework of the brief, although the court left the decision if the Connecticut public policy supports waiving a duty to warn or protect in this case to the Supreme Court of Connecticut.

**Situation in Other States**

The Second Circuit cited two similar cases in New York and in Illinois. In *David v. City of New York* (2007) and *Mancha v. Field Museum of Natural History* (1972), the courts “encourage extracurricular activities by limiting the duties of schools to warn about or protect against unlikely or unusual events” (*Munn v. Hotchkiss School*, 2015, p. 18). At the same time, the court also cited other two cases in Iowa and Washington where courts approved the duties of schools in the context of extracurricular activities.
In addition, when referring to the Connecticut law, the Second Circuit also noted the example of California law, where clearly establishes a statutory immunity for school trips (Cal. Educ. Code § 35330(d)), and the fact that the Connecticut legislature has not enacted in the same way.

**Implications and Possible Effects of the Theory**

As the court admits and the brief supports, this case leads the liability litigates regarding study abroad and foreign trips. Therefore, the final decision by the Second Circuit (and the determinant decision by the Supreme Court of Connecticut) will be an important precedent in this field. As described in the introduction, this case will be a precedent not only in the secondary education but also in higher education, where more students are likely to study abroad. There could be a difference between minor students and adult students in terms of conditions of constituting negligence. However, the overall liability of education institutions (i.e., how far institutions must protect their students) would be similar. The Second Circuit clearly understands the importance by stating that “this case is likely to have repercussions beyond this particular fact pattern as it implicates broad questions of Connecticut public policy” (*Munn v. Hotchkiss School*, 2015, p. 20). Furthermore, although this case is directly applicable in Connecticut because “the scope of duty in negligence law is ‘paradigmatically a state field’” (*Munn v. Hotchkiss School*, 2015, p. 20, citation omitted), this case will be likely to be cited in other cases just as this case cited other cases in different jurisdictions.

If the public policy theory is applied (i.e., the courts favor the importance of study abroad as a public policy), Hotchkiss would win the case and there would be no drastic change in the field of international education. However, the question if it would be reasonable to leave the past and future costs to the Munns (and possible future victims) remains.
On the other hand, if the policy is not applied, education institutions will have to provide much more information with participants of study abroad programs in order not to be sued when accidents happen. This would be a great ease for the Munns (and future victims), but as the brief points out;

Even if it were theoretically possible for an education institution to sort through and provide meaningful warnings to students about all such diseases, the paperwork would be so lengthy as to be ignored. Thus, imposing such a duty is unlikely to increase safety by reducing avoidable harm. (Brief for Appellant, Munn v. Hotchkiss School, 2015, p. 21)

Furthermore, it would be very likely that the number of study abroad programs decreases because sponsoring such programs would infer the possible great costs to an education institution. The Second Circuit notices this possible problem and also certify the issue of remittitutur to the Supreme Court of Connecticut, but there could be still a large amount of cost to Hotchkiss after remittitur.

**Recommendation**

**The Courts Should Apply the Public Policy Theory**

Considering the large possible impacts on the field of international education, the Supreme Court of Connecticut (and thus the Second Circuit) should apply the public policy theory in favor of education institutions. As the brief argues and the Second Circuit notes, “international trips and outdoor activities, while sometimes posing substantial health and safety risks, offer important benefits to their participants” (Munn v. Hotchkiss School, 2015, p. 16). Moreover, the Connecticut legislature has enacted a law which states:

It shall be the policy of the state to encourage its students, teachers, administrators and educational policy makers to participate in international studies, international exchange
programs and other activities that advance cultural awareness and promote mutual understanding and respect for the citizens of other countries. (Conn. Gen. Stat. § 10-27(a))

Clearly, promoting study abroad is public policy of the State of Connecticut. In order to implement this policy more firmly, universities (and other education institutions) should be exempted from a certain risk, especially from unforeseeable risks in negligent cases. To be sure, it is also recommended for the legislature of Connecticut to enact the exemption clearly in Connecticut statutory law. Although the public policy theory is already established through precedents, an enacted law would further promote the policy over the concern of tort litigations. In this way, universities are free from the risk of being sued and will be able to further promote study abroad programs, which would contribute to the general public of Connecticut. Obviously enacting statutory law in every state is also recommended to further expand this policy.

If the courts do not apply the public policy theory, not only Hotchkiss but also all education institutions which sponsor study abroad programs have to worry about possible litigations and large amount of monetary compensation. As examined, this would decrease study abroad programs, which contradicts the established law. Further, even if the courts admit a remittitur in this case, it does not necessarily help other cases because similar litigations would continue to happen. Therefore, it is the best solution for this case to apply the public policy theory in order to realize the promotion of study abroad, which is the duly established public policy of Connecticut.

**Counterarguments: Who should Pay the Damages?**

Even though the promotion of study abroad is established public policy at least in Connecticut, it would be a valid objection for this case to focus on the damage to the victim. Unfortunately, accidents sometimes happen in study abroad programs, and the risk is inevitably
higher than in classroom situations, even though victims are usually not at all responsible for such accidents. It would be too much to burden damages to unfortunate non-responsible victims, especially considering it would be a large amount. In fact, the jury in this case found $10.25 million only in economic damages.

However, it would be injustice to impose such costs to the sponsors of the programs, just because an accident happened in a sponsored program. Unless there is any intentional interference or gross negligence, a sponsor would be also a victim of an unfortunate accident. Assuming that “it is unreasonable to expect a trip organizer to warn students about or protect them against every danger” (Munn v. Hotchkiss School, p. 16), preparing for all “foreseeable” (in terms of Connecticut courts’ “broad” view) risks would be impossible, even though it would formally constitute negligence.

In this case, insurance would be the best option to ease the burden of damages. Education institutions often require participants of study abroad programs to be enrolled in a travel insurance (Penn State Office of Global Programs, n.d.). This is reasonable because it often costs much if one needs to see a doctor in a foreign country. It also sometimes happens that a patient has to be airlifted to another hospital in another city or even another country due to low medical level of local hospital. This often costs a few hundred thousand dollars but it would be covered by a travel insurance. Similarly, an insurance for severe physical impediment can be included in travel insurances. Even though the required amount of money would be large, a premium for the option would not cost too much because such accident rarely occurs. If needed, education institutions and/or any level of governments (assuming they supports study abroad programs) might be able to assist (a part of) the premium. Such costs should be far lower than possible litigation costs.
Additional Means to Deal with Risks

Even if the public policy theory applies to study abroad programs, it does not mean education institutions are free from all risks. They are still responsible for the possible risks if there is any gross negligence. In addition, even if there would be no legal responsibility and even though it is impractical for education institutions to foresee all possible risks, they usually would like to care the study abroad participants as much as they can. From this view, Hotchkiss’ preparation in this case was a bit careless. According to the courts’ findings, Hotchkiss provided incorrect webpage link of CDC documents and its infirmary was not able to provide proper advice to participants, unlike the previous notice that stated the infirmary could serve as a travel clinic (Munn v. Hotchkiss School, 2015). Considering the fact that the medical level in China is not necessarily as good as in U.S. (in fact, Munn was airlifted to New York after being hospitalized in Beijing), Hotchkiss could have been more careful in preparing the program.

However, it might be difficult for education institutions to prepare for every program properly, especially when they are small institutions. In order to help such institutions, international educators would be able to establish a new organization to support in managing risks of study abroad programs. The new organization could be a new center attached to an existing organization, such as NAFSA: Association of International Educators. The new organization, operated by membership fees and/or charges for information, provides education institutions with information regarding possible risks including medical and security concerns. In this way, education institutions will be able to provide more proper, updated information with program participants, compiled by the professional staff at the organization. This will lead more safe programs for both of institutions and participants. In addition, this might also rationalize
institutions’ “exercise of standard care” in negligence litigation, if the public policy theory does not apply to accidents during a study abroad program.

Conclusion

Courts often have to consider difficult balance between parties in negligence litigations because there is often no entity that is absolutely responsible for the happened damage. In *Munn v. Hotchkiss School*, the main cause of the unfortunate result was a rare bite of an insect. Even if the result was theoretically foreseeable, imposing such a duty on education institutions would greatly harm study abroad programs, which many governments recognize the importance. Therefore, education institutions should be exempted from responsibility of negligence in the case of study abroad because of the importance of study abroad as public policy.

Although this paper analyzed the effectiveness of the public policy theory in negligence cases, it does not resolve everything. Unfortunate accidents do happen and some kind of supports should be provided for the victims. Considering its rarity and large amount of damages, the scheme of insurance, attached to existing travel insurances would be the best option to compensate such victims. A new organization to support educational institutions by providing information is another suggestion. The organization would allow education institutions to provide safer study abroad programs and thus it also benefits program participants.

As the Second Circuit notes, study abroad opportunities provide important benefits with their participants by “expos[ing] children to situations outside of their comfort zones and of the organizers’ control” (*Munn v. Hotchkiss School*, 2015, p. 16). Even though few unfortunate accidents happen, they are inevitable because of the nature of such programs and there are much more benefits in promoting study abroad. Such attitude would increase the total benefits of the public.
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