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## Tick-Bite Litigation: An Illustration of the Battle over Duty and Breach in Connecticut and the Second Circuit Notes

Michael J. Senzer

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## Note

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MICHAEL J. SENZER

*In cases with tragic facts, the jury is perhaps the chief danger to a defendant. Attorneys defending tort suits routinely argue that courts should dismiss a case on grounds that a tortfeasor does not owe a victim a duty of care. This often takes the form of an argument that fact-specific “limited” duties should be created in order to dismiss a plaintiff’s case.*

*Two Connecticut cases—Munn v. Hotchkiss School, and Horowitz v. YMCA Camp Mohawk, Inc.—are implicated in the broader debate regarding whether limited duty is being used properly. The plaintiffs’ claims specifically concern injuries from tick-borne illness (TBI) suffered by minors in educational environments. But there are broader implications. With the Munn case raising serious questions of state law in the context of an appeal to the Second Circuit—meriting certified questions to the Connecticut Supreme Court—the role of limited duty in Connecticut jurisprudence is ripe for review. Connecticut’s answer as to the proper use of limited duty in the Munn case will likely have effects reaching far beyond these TBI cases.*

*This Note argues that Connecticut and other jurisdictions should embrace a form of limited duty that is perhaps itself well described as “limited.” In order to preserve factual issues for the trier of fact and the function of dispositive motions based on the existence or non-existence of those issues (e.g., summary judgment), the existence of duty should remain an abstract inquiry into the relationship between plaintiff and defendant. Thus, this Note contends that public policy analysis should not play a role in determining whether a legal duty exists unless there is a legal principle that merits restricting the responsibilities that exist given the basic relationship between the parties. In cases where the existence of a legal duty is otherwise clear at this level of generality, courts should not use public policy analysis to qualify legal duty. Since the duty inquiry is an inquiry into law and not facts, this sort of reserved approach is what is judicially proper—in the TBI cases, and for all cases.*

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# Tick-Bite Litigation: An Illustration of the Battle Over Duty and Breach in Connecticut and the Second Circuit

MICHAEL J. SENZER\*

## I. INTRODUCTION

Ticks are dangerous creatures. Injuries from tick bites have led to death,<sup>1</sup> amputations,<sup>2</sup> and paralysis,<sup>3</sup> as well as fear among the uninjured.<sup>4</sup> These parasites are small and public knowledge about them varies greatly.<sup>5</sup> They have a salivary numbing agent, which makes detecting them difficult.<sup>6</sup> They can carry several diseases.<sup>7</sup> Best practices in preventing tick-borne illness (TBI) include wearing repellent, tucking socks into long pants, and wearing boots,<sup>8</sup> measures that perhaps cannot realistically be

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<sup>1</sup> See, e.g., Anna Edney, *Newly Found Virus Linked to Kansas Death After Tick Bite*, BLOOMBERG BUS. (Feb. 20, 2015, 2:08 PM), <http://www.bloomberg.com/news/articles/2015-02-20/newly-found-virus-linked-to-kansas-man-s-death-after-tick-bite> [https://perma.cc/8P3V-LYVM] (relating the circumstances of a Kansas man's death from organ failure after being bitten by a tick).

<sup>2</sup> E.g., Ben Brumfield, *Tick Bite Leads to Amputation of Woman's Limbs*, CNN.COM (Aug. 14, 2015, 8:55 PM), <http://www.cnn.com/2015/08/14/health/oklahoma-tick-bite-amputation-spotted-fever/> [https://perma.cc/F32M-6FQQ] (describing the circumstances under which an Oklahoma woman suffered a serious tick-borne illness, necessitating amputations to each of her limbs).

<sup>3</sup> See Laura Landro, *Safety 101 for Summer Jaunts*, WALL ST. J. (July 15, 2009, 1:40 PM), <http://www.wsj.com/articles/SB10001424052970204261704574272140181146368> [http://web.archive.org/web/20160809032814/http://www.wsj.com/articles/SB10001424052970204261704574272140181146368] (discussing the injuries at issue in *Munn v. Hotchkiss School*, 24 F. Supp. 3d 155 (D. Conn. 2014)).

<sup>4</sup> See, e.g., Alexandra Zissu, *Ticks: Summer's Unwanted Guests*, N.Y. TIMES (Aug. 12, 2015), [http://www.nytimes.com/2015/08/13/fashion/ticks-summers-unwanted-guests.html?\\_r=0](http://www.nytimes.com/2015/08/13/fashion/ticks-summers-unwanted-guests.html?_r=0) [http://web.archive.org/web/20150101000000\*/http://www.nytimes.com/2015/08/13/fashion/ticks-summers-unwanted-guests.html?\_r=0] (discussing a "growing phobia of diseases borne by the arachnid [ticks] among . . . [the] set" in places like Greenwich, CT, and Shelter Island, NY).

<sup>5</sup> See, e.g., Sue Byrne, *Why Tick Bites Can Be So Dangerous*, CONSUMER REP. (Aug. 20, 2015, 6:00 AM), <http://www.consumerreports.org/cro/news/2015/08/why-tick-bites-can-be-so-dangerous/index.htm> [https://perma.cc/STP8-QTVZ] (quoting a conversation with CDC research biologist Mark C. Dolan).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

followed, at least routinely.

The threat of TBI has existed for as long as humans and ticks have come into contact, but climate change has made the threat particularly pressing.<sup>9</sup> In 2014, the majority of domestic Lyme Disease cases originated in the northeast.<sup>10</sup>

Injuries from tick bites have recently led to tort suits. In Connecticut, two cases—*Munn v. Hotchkiss School*,<sup>11</sup> and *Horowitz v. YMCA Camp Mohawk, Inc.*<sup>12</sup>—suggest that schools and camps might be liable for TBI suffered by minors in their care. These TBI cases are part of a broader problem: when cases contain tragic facts, the chief danger to defendants may be a jury. In an effort to bypass the jury in such cases,<sup>13</sup> defense lawyers argue that fact-specific limited duties are appropriate.

This Note argues that courts should not limit duties in cases where the law concerning legal duty is clear and doing so would deprive the trier of fact of its role. With respect to these TBI cases, educational caregivers' duties to minors, arising out of the basic relationship between the parties, should not be limited based on arguments about specific facts. In other words, limited duties should not be recognized contrary to the general duty of care that exists given the basic relationship between the parties. In order to preserve facts for the jury, policy analysis ought not be reached unless a clear legal principle evident based on the general relationship between the parties warrants doing so. Recognizing a duty at this abstract level does not necessarily mean that a defendant breaches its standard of care to a

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<sup>9</sup> Tick populations are reported to be soaring as a consequence of warmer global temperatures. E.g., Christina Ross et al., *Limiting Liability in the Greenhouse*, 43A STAN. J. INT'L L. 251, 279 (2007) (discussing the threats to human health that may become increasingly likely to cause harm as the planet warms); Janine Maney, Note, *Carbon Dioxide Emissions, Climate Change, and the Clean Air Act*, 13 N.Y.U. ENVTL. L.J. 298, 361–63 (2005) (relating the causes of disease that the EPA anticipates to have an increasingly adverse effect on the New England states as climate change occurs).

<sup>10</sup> The CDC reports that 96% of cases of Lyme Disease reported in 2014 originated in fourteen states, ten of which are in the northeast. See *Data and Statistics, Lyme Disease*, CDC.GOV, <http://www.cdc.gov/lyme/stats/> [<https://perma.cc/2QP2-V4GF>] (last visited Jan. 13, 2016) (identifying Maryland, Minnesota, Wisconsin, and Virginia as hotbeds for Lyme Disease outside of the northeast).

<sup>11</sup> 24 F. Supp. 3d 155 (*Munn Trial*) (D. Conn. 2014). In this case, the trial court denied the defendant school's post-trial motions and entered a \$41.465 million jury verdict. *Id.* at 214. The case is currently on appeal to the Second Circuit Court of Appeals. Brief of Defendant-Appellant, *Munn v. Hotchkiss Sch.*, 795 F.3d 324 (2d Cir. 2015) (No. 12-2410-cv) [hereinafter *Hotchkiss Brief*]. The Second Circuit has sent certified questions of law to the Connecticut Supreme Court. *Munn v. Hotchkiss Sch. (Munn Appeal)*, 795 F.3d 324, 337 (2d Cir. 2015).

<sup>12</sup> Complaint & Demand for Jury Trial at 1–15, *Horowitz v. YMCA Camp Mohawk, Inc.*, No. 3:13-CV-01458 (D. Conn. Oct. 4, 2013), ECF No. 1 [hereinafter *Horowitz Compl.*]. Plaintiffs, a teenager and her parents, allege that a defendant sleep-away camp, where the teen was apparently exposed to a tick and contracted Lyme Disease, was negligent for its failure to warn of tick-related risks, and that the camp's nurses provided wanton health treatment. See *id.* (setting forth allegations as to how the teenage plaintiff was apparently injured).

<sup>13</sup> See Dilan A. Esper & Gregory C. Keating, *Abusing "Duty"*, 79 S. CAL. L. REV. 265, 267 (2006) (claiming that "[t]he civil jury trial is now under growing attack").

plaintiff; nor does it mean that a defendant's acts or omissions are the proximate cause of a defendant's injuries. It simply clarifies that these considerations—being issues of fact—should be reserved to the trier of fact unless no fact-finder could reasonably resolve them in more than one way. They should not be assessed in duty decisions, limited or not.

This Note will proceed in five parts to analyze how Connecticut<sup>14</sup> should respond to the TBI cases and the uncertainty about limited duty generally. This Introduction is followed by Part II, which discusses the legal theory and Connecticut case law surrounding limited duties. Part III will review the *Munn* and *Horowitz* litigation. Part IV will discuss the Second Circuit's decision to grant certified questions of law to the Connecticut Supreme Court and argue that Connecticut should not recognize a limited duty in *Munn*. Part V will conclude in a recommendation concerning how courts should handle arguments for limited duty—in TBI cases and in general—for the future.

## II. TICK-BORNE ILLNESS AND LIMITED DUTY: AN OVERVIEW

Duty is the threshold inquiry in tort law that determines whether a jury will hear a case.<sup>15</sup> Generally, a legal duty exists when a plaintiff's interests are said to be entitled to protection against a defendant's conduct<sup>16</sup> and reasonable people recognize and agree that one exists.<sup>17</sup> In most cases, its existence is a nonissue.<sup>18</sup>

While no universal test for the existence of a legal duty has been formulated,<sup>19</sup> an actor ordinarily has a duty to exercise reasonable care when his or her conduct creates a risk of physical harm to another.<sup>20</sup> In situations that involve positive acts—for instance, driving a car—an actor typically has a duty to exercise reasonable care towards people who could be harmed by their activity.<sup>21</sup> This means that an actor can be liable for injuries that the actor could foresee as harmful to the person who was harmed by the negligent conduct.<sup>22</sup>

In situations that do not involve positive acts, a person is not ordinarily under any legal duty to conduct himself or herself according to a particular

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<sup>14</sup> Comparisons to New York are offered where contrast between the jurisdictions is appropriate and helpful.

<sup>15</sup> See *Esper & Keating*, *supra* note 13, at 265–66 (explaining the pivotal role of duty in whether or not a tort action will proceed).

<sup>16</sup> W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 357–58 (5th ed. 1984).

<sup>17</sup> See *id.* at 378.

<sup>18</sup> *Esper & Keating*, *supra* note 13, at 266.

<sup>19</sup> KEETON ET AL., *supra* note 16, § 53, at 357–58.

<sup>20</sup> A CONCISE RESTATEMENT OF TORTS: LIABILITY FOR PHYSICAL HARM § 7(a) (2d ed. 2010).

<sup>21</sup> KEETON ET AL., *supra* note 16, § 53, at 357.

<sup>22</sup> See *id.*

standard of care.<sup>23</sup> In these cases, a tortfeasor can contend that there is not a duty to do a particular thing—for example, to warn a blind person of a pothole that he or she is about to fall into.<sup>24</sup> Liability for such omissions may exist, however, where there is a relationship between two parties that, in light of social policy, mandates intervention.<sup>25</sup> Expressed another way, the general rule is that a party with protective control over another party owes that party an affirmative duty to take reasonable precautions to guard him or her against harms.<sup>26</sup> The Restatement (Third) of Torts suggests that courts recognize affirmative duties as follows:

- (a) An actor in a special relationship with another owes the other a duty of *reasonable care with regard to risks that arise within the scope of the relationship*.
- (b) Special relationships giving rise to [this] duty . . . include:
  - . . .
  - (5) a school with its students, . . .
  - (7) a custodian with those in its custody, if:
    - (a) the custodian is required by law to take custody or voluntarily takes custody of the other; and
    - (b) the custodian has a superior ability to protect the other.<sup>27</sup>

Even in these circumstances, however, a duty is not absolute.<sup>28</sup> As the Restatement indicates, duties arising under § 40 can still be abrogated if a court determines that a limited duty is appropriate.<sup>29</sup> A school, for instance, owes its students a duty of *reasonable care* to protect against the risks that arise within the scope of its relationship with them,<sup>30</sup> but there is not a legal

<sup>23</sup> *Id.*

<sup>24</sup> DAN B. DOBBS, *THE LAW OF TORTS* § 279, at 579 (2000); *CONCISE RESTATEMENT OF TORTS*, *supra* note 20, § 7 cmt. b, at 124. A no duty argument is distinct from the argument that a defendant is not *negligent* as a matter of law. *Id.* § 7 cmt. i, at 126–27.

<sup>25</sup> KEETON ET AL., *supra* note 16, § 56, at 374. The question has also been described as whether a party has “gone so far in what he has actually done, and . . . got[] himself into such a relation with the plaintiff, that he has begun to affect the interests of the plaintiff adversely [if he fails to act in some way].” *Id.* § 56, at 375.

<sup>26</sup> *Id.* § 56, at 383.

<sup>27</sup> RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARMS § 40 (AM. LAW INST. 2012). The implications of this duty and its prior formulation as § 314A of Restatement (Second) of Torts are discussed *infra* at Part IV.B.3.

<sup>28</sup> KEETON ET AL., *supra* note 16, § 56, at 385.

<sup>29</sup> RESTATEMENT (THIRD) OF TORTS § 40 cmt. b.

<sup>30</sup> *CONCISE RESTATEMENT OF TORTS*, *supra* note 20, § 40(b)(5), at 140. This is an exception to the general rule that “[a]n actor whose conduct has not created a risk of physical or emotional harm to another has no duty of care to the other.” *Id.* § 37, at 130; *cf. id.* § 7 cmt. *l*, at 128 (describing the relationship between § 7 and § 37). A duty can also be created by statute. *Id.* § 38, at 135.

duty to anticipate or prevent dangers that cannot be reasonably foreseen.<sup>31</sup>

### A. Limited Duties

Under certain circumstances, courts will recognize a duty that is more limited than the general duty of reasonable care.<sup>32</sup> This can happen whether courts describe a harmful incident as nonfeasant (i.e., not involving a positive act) or misfeasant (i.e., involving a positive act).<sup>33</sup> Whereas in most cases a legal duty is simply a general rule of law<sup>34</sup> that does not turn on analysis of particular facts,<sup>35</sup> limited duties arise through exceptions.<sup>36</sup> If the general duty to use reasonable care is analogous to a blunt meat cleaver and the determination of negligence is a finely tuned instrument, then a limited duty determination might be said to be a scalpel with which courts can excise duties that would otherwise exist under the general duty to use reasonable care.<sup>37</sup> Thus, when a court articulates a limited duty, it is unwilling to say that a defendant-tortfeasor owes this standard duty to exercise reasonable care to a plaintiff-victim that a defendant-tortfeasor would conventionally owe, given his relation to the plaintiff-victim.<sup>38</sup> This does not mean, however, that a defendant-tortfeasor might not owe a general duty to a plaintiff-victim in alternative circumstances.<sup>39</sup>

The Restatement (Third) of Torts recommends that courts apply the following analytical framework to determine whether limited duties are proper:

- (a) An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.
- (b) In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.<sup>40</sup>

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<sup>31</sup> KEETON ET AL., *supra* note 16, § 56, at 385. In other words, there is not a duty to know that precautions which cannot be foreseen are called for.

<sup>32</sup> CONCISE RESTATEMENT OF TORTS, *supra* note 20, § 7 cmt. j, at 127–28.

<sup>33</sup> EDWARD J. KIONKA, TORTS: IN A NUTSHELL 119 (5th ed. 2010).

<sup>34</sup> DOBBS, *supra* note 24, at 577.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> See Aaron D. Twerski, *The Cleaver, the Violin, and the Scalpel: Duty and the Restatement (Third) of Torts*, 60 HASTINGS L.J. 1, 4 (2008) (supplying these analogies).

<sup>38</sup> See MORRIS ON TORTS 168–69 (1953) (describing the situations in which liability does or does not extend to a defendant).

<sup>39</sup> DOBBS, *supra* note 24, at 577.

<sup>40</sup> RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARMS § 7(b) (AM. LAW INST. 2005).



Thus, under the Restatement, limited duty cases are exceptional cases in which an articulated principle or policy warrants denying or limiting liability.<sup>41</sup> In other words, courts generally recognize these rules where the policy implications of a case warrant freeing a defendant from liability.<sup>42</sup> As a matter of tort policy, scholars have stressed that these rules should be rules of law that have the quality of generality.<sup>43</sup> Scholars have also suggested that judges should abstain from creating limited duties that do not reflect general rules of law.<sup>44</sup>

One central policy issue implicated by limited duty concerns whether judges should be able to decide issues that are normally jury questions—including issues about costs, benefits, and foreseeability—in the jury’s stead, and without access to all the evidence that may come out at trial.<sup>45</sup> Scholars have said that courts should refrain from defining specific duties to act or freedoms not to act in specific ways, because doing so requires deciding facts or considering evidence properly reserved to the breach analysis.<sup>46</sup> In other words, “[limited duty rules] should not merely be masks for decisions in particular cases . . . . [T]he . . . locution [should not be used] as a convenient but misleading way to decide the breach of duty issue—the negligence issue—instead of leaving that issue to the jury.”<sup>47</sup> Expressed yet another way, judges should recognize that consideration of certain facts should be reserved to the jury’s analysis of the specific scope of duty or whether there is liability, and not taken up in determination of whether a legal duty does or does not exist.<sup>48</sup> In this view, judges should simply ask at the duty phase whether an ordinarily prudent person would owe a particular victim a duty.<sup>49</sup>

Another policy implication concerns whether limited duty rules are formed in a manner that creates predictable and reasonably uniform decisions on the one hand and leaves room for adjudication of each case on its own merits on the other.<sup>50</sup> The former consideration concerns whether future juries should be able to reach radically different results in similar or identical cases, in lieu of uniformity.<sup>51</sup> In contrast, the latter consideration concerns whether defendants in future, similar cases will be free to take

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<sup>41</sup> CONCISE RESTATEMENT OF TORTS, *supra* note 20, § 7(b), at 122.

<sup>42</sup> DOBBS, *supra* note 24, at 579.

<sup>43</sup> *Id.*

<sup>44</sup> *See id.* at 580 (discussing the perspective that judges should abstain from creating limited duty rules where “facts will differ from case to case, and consequently the issue is not to be decided by a rule of law”).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 579–80.

<sup>48</sup> CONCISE RESTATEMENT OF TORTS, *supra* note 20, §7 cmt. a, at 122–24.

<sup>49</sup> DOBBS, *supra* note 24, at 580.

<sup>50</sup> *Id.* at 582–83.

<sup>51</sup> *Id.* at 583.

risks that the community, through a jury, might find to be unreasonable.<sup>52</sup> To this end, scholars have suggested that limited duty rules are only appropriate when a court can promulgate relatively clear and categorical bright-line rules of law applicable to a general class of cases<sup>53</sup> so that duty is constructed from “building blocks of policy and justice.”<sup>54</sup>

A judge who debates whether or not to create a limited duty rule might also consider repercussions on society at large and moral implications. Courts often justify their limited duty decisions on social norms regarding responsibility.<sup>55</sup> They may consider the overall impact of imposing a precautionary obligation on a class of actors (i.e., the defendant(s) and similarly situated future tortfeasors) if they were to decline to recognize a limited duty.<sup>56</sup> Notwithstanding these possible considerations, limited duties remain policy-driven exceptions to a general duty to use reasonable care.<sup>57</sup> Indeed, scholars have noted that general duties are proper “in the great majority of instances . . . [because they] preserve[] an appropriate arena for adjudication in individual cases.”<sup>58</sup>

Many jurisdictions have developed factor-based tests to assess whether a limited duty rule is proper. These factors often assess the following general considerations: the extent to which the transaction was intended to affect the plaintiff; the defendant’s ability to foresee the plaintiff’s harm; the degree of the defendant’s certainty that the plaintiff would suffer injury; the closeness of the connection between the defendant’s conduct and the injury it caused; the moral blame attached to the defendant’s conduct; the policy of preventing future harm by deterrence; administrative factors (e.g., judicial economy); and the relationship between the parties and their customs.<sup>59</sup>

Possible problems associated with using these sorts of factors include that they can be treated as “mechanical bases for structuring judicial opinions in the direction judges feel appropriate . . . [and that] they are mainly the same factors that determine the negligence question . . . [allowing] the judge, not the jury, [to be] the decision maker.”<sup>60</sup> Additionally, these factors might be used to dismiss cases on a finding of limited duty where intermediate options are arguably fairer. A judge who declines to dismiss a case on a finding of limited duty might later issue

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<sup>52</sup> *Id.* at 584.

<sup>53</sup> CONCISE RESTATEMENT OF TORTS, *supra* note 20, § 7 cmt. a, at 122–24.

<sup>54</sup> DOBBS, *supra* note 24, at 582.

<sup>55</sup> CONCISE RESTATEMENT OF TORTS, *supra* note 20, § 7 cmt. c, at 124–25.

<sup>56</sup> *Id.* § 7 cmt. i, at 125–26.

<sup>57</sup> *See* DOBBS, *supra* note 24, at 582. In relationships that give rise to affirmative duties, this general duty includes a duty to give reasonable precautions or warnings.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 582–83.

<sup>60</sup> *Id.* at 583.

relief in a defendants' favor through dispositive motions, including summary judgment,<sup>61</sup> directed verdict,<sup>62</sup> or judgment notwithstanding a jury's verdict,<sup>63</sup> essentially, on grounds that no reasonable trier of fact could resolve any issue in the non-movant's favor. Moreover, a defendant's tortious act or omission is not always proximate to a plaintiff's injury; quite simply, a defendant who has a duty is not always liable for a plaintiff's loss.

## B. Connecticut's Approach to Limited Duty Questions

### 1. Illustrative Cases

In *Jaworski v. Kiernan*,<sup>64</sup> the plaintiff, a member of an adult coed soccer league, sued the defendant, her opponent, after he collided with her during the course of a game, resulting in a 15% permanent disability to the plaintiff's left knee.<sup>65</sup> The trial court held that the defendant owed the plaintiff a general duty to use reasonable care and could be liable for the injurious conduct.<sup>66</sup> The Connecticut Supreme Court reversed. The court explained that the defendant only owed the plaintiff a duty to refrain from reckless or intentionally injurious game-play conduct.<sup>67</sup>

Under Connecticut's approach to determining whether a legal duty exists, the first test is whether the defendant, "knowing what he knew or should have known, would anticipate that harm of the general nature of that suffered [by the plaintiff] was likely to result."<sup>68</sup> If harm is foreseeable in this sense, then Connecticut courts can "determine as a matter of policy the extent of the legal duty to be imposed upon the defendant."<sup>69</sup> In this case, the court did so by weighing the following four factors:

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<sup>61</sup> "[S]ummary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

<sup>62</sup> "If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may[] resolve the issue against the party[] and . . . grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue." FED. R. CIV. P. 50(a).

<sup>63</sup> "[If a party's motion for directed verdict under Federal Rule of Civil Procedure 50(a) is denied and the case is tried to verdict, then] the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial . . . . In ruling on the renewed motion, the court may[] allow judgment on the verdict, . . . order a new trial[, or] direct the entry of judgment as a matter of law." *Id.* 50(b).

<sup>64</sup> 696 A.2d 332 (Conn. 1997).

<sup>65</sup> *Id.*

<sup>66</sup> *Jaworski v. Kiernan*, No. CV 940464969S, 1996 WL 489038, at \*3 (Conn. Super. Ct. June 17, 1997).

<sup>67</sup> *Jaworski*, 696 A.2d at 333.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

(1) the normal expectations of participants in the sport in which the plaintiff and the defendant were engaged; (2) the public policy of encouraging continued vigorous participation in recreational sporting activities while weighing the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions.<sup>70</sup>

To justify its duty decision, the court applied these factors as follows: first, finding that normal expectations accommodated the possibility of injury because of “enthusiasm [that leads to] inadvertent rules violations;”<sup>71</sup> second, determining that such a limited duty would serve the aims of “maintain[ing] civility and relative safety in team sports without dampening the competitive spirit;”<sup>72</sup> third, finding that such a limitation would check the “potential for a surfeit of lawsuits” from athletic activity;<sup>73</sup> and fourth, noting that a majority of jurisdictions had chosen to recognize this limitation.<sup>74</sup>

Notably, the court also suggested that limited duty analysis is properly used to determine if, as it found in this case, “public policy considerations . . . support[] limiting [a] defendant’s responsibility” for foreseeable injuries.<sup>75</sup> In sum, the court held that limited duties were proper in injuries arising out of game-play conduct, because “a participant’s main objective is to be a winner, and we expect that the players will pursue that objective enthusiastically.”<sup>76</sup>

In the subsequent case of *Lodge v. Arett Sales Corp.*,<sup>77</sup> the plaintiffs, firefighters injured when their fire engine careened out of control due to brake failure, sued the defendant, which installed an alarm system at a third-party’s property; the alarm generated a false fire alarm, to which the plaintiffs responded via fire engine.<sup>78</sup> Reversing the trial court’s denial of summary judgment as to the alarm company,<sup>79</sup> the Connecticut Supreme Court held that this defendant did not owe a duty of care to the plaintiffs.<sup>80</sup> The court emphasized that an injury should only be considered foreseeable if its specific circumstances could be foreseen by the defendant, given the

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<sup>70</sup> *Id.* at 336–37.

<sup>71</sup> *Id.* at 337.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 337–38.

<sup>74</sup> *Id.* at 338.

<sup>75</sup> *Id.* at 337.

<sup>76</sup> *Id.*

<sup>77</sup> 717 A.2d 215 (Conn. 1998).

<sup>78</sup> *Id.* at 218–19.

<sup>79</sup> *Hughes v. Arett Sales Corp.*, No. 097106, 1994 WL 86464, at \*4 (Conn. Super. Ct. Mar. 7, 1994).

<sup>80</sup> *Lodge*, 717 A.2d at 222.

parties' relationship.<sup>81</sup> Thus, the court reasoned that retrospective foreseeability based on the plaintiffs' claim that the alarm company could foresee the brake failure should not be used to argue that a remote consequence of benign conduct—here, the defendant's providing the alarm system—is a reason to impose a duty.<sup>82</sup> The court further noted that a defendant should not be required to foresee perils that it could not *reasonably* foresee, because this could not be considered to further legitimate objectives of law.<sup>83</sup> Additionally, the court discussed the role of public policy in determining whether a legal duty exists; it emphasized that Connecticut's position is that "when the *social costs* associated with liability are too high to justify its imposition, no duty will be found."<sup>84</sup>

In *Monk v. Temple George LLC*,<sup>85</sup> the plaintiff, a victim of an assault in a New Haven parking lot, sued the defendants, the lot's owner and operator.<sup>86</sup> The trial court had granted summary judgment for the defendants on the grounds that the defendants did not owe a duty to prevent the plaintiff's injuries.<sup>87</sup> The Connecticut Supreme Court reversed and remanded. It noted that "[t]he test for determining legal duty is a two-prong analysis that entails: (1) a determination of foreseeability; and (2) public policy analysis."<sup>88</sup> Thus, it determined that the relationship between the plaintiff and the defendants could merit a duty, because the injury was foreseeable, and "imposing a duty of care on the defendants under the circumstances of the present case is not inconsistent with public policy."<sup>89</sup>

As to policy, the court opined that judges considering the policy implications of a duty should assess the following four factors, which parallel the factors articulated in *Jaworski*:

- (1) the normal expectations of participants in the activity at issue;
- (2) the public policy of encouraging participation in an activity, while weighing participants' safety;
- (3) the avoidance of increased litigation; and
- (4) the decisions of other jurisdictions.<sup>90</sup>

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 223.

<sup>84</sup> *Id.* (emphasis added).

<sup>85</sup> 869 A.2d 179 (Conn. 2005).

<sup>86</sup> *Id.* at 187.

<sup>87</sup> *Monk v. Temple George Assocs., LLC*, No. CV010447092, 2003 WL 21036486, at \*2 (Conn. Super. Ct. Apr. 29, 2003). Under Connecticut law, the issue of whether a duty exists is a question of law. *Gomes v. Commercial Union Ins. Co.*, 783 A.2d 462, 470 (Conn. 2001).

<sup>88</sup> *Monk*, 869 A.2d at 185 (citing *Jaworski v. Kiernan*, 696 A.2d 332, 336 (Conn. 1997)).

<sup>89</sup> *Id.* at 187.

<sup>90</sup> *Id.* Similarly, the New York Court of Appeals has instructed that "[j]udicial recognition of a duty of care must be based upon an assessment of its efficacy in promoting a social benefit as against its costs and burdens." *Peralta v. Henriquez*, 790 N.E.2d 1170, 1173 (N.Y. 2003).

The court applied these factors as follows: first, finding that normal expectations favored recognizing a duty, because the defendants' parking lot was located in a high crime area;<sup>91</sup> second, holding that public policy favors a duty, because business activity should be promoted, and the burden of adopting the measures would not likely dampen business;<sup>92</sup> third, determining that such measures would not likely lead to viable negligence claims;<sup>93</sup> and fourth, recognizing that despite different treatments of premises liability, other jurisdictions' decisions supported the result.<sup>94</sup>

Accordingly, the court applied these factors to hold that "there is no compelling reason grounded in public policy to shield the defendants from their duty [of reasonable care]."<sup>95</sup> It ultimately remanded the case for trial on grounds that there was a genuine issue of material fact as to whether the defendants' conduct was a proximate cause of the plaintiff's injuries.<sup>96</sup>

In *Sic v. Nunan*,<sup>97</sup> the plaintiff, a driver injured when the defendant's car collided with hers after the defendant's vehicle was struck from behind by another vehicle as the defendant prepared to make a left turn, sued the defendant for failing to position his wheels in such a manner that he would not have struck the plaintiff's car if hit from behind.<sup>98</sup> The trial court granted summary judgment for the defendant on grounds that he did not owe the plaintiff a duty to position his wheels to avoid an injurious collision.<sup>99</sup> Unlike in *Monk*, the Connecticut Supreme Court affirmed summary judgment on grounds that a legal duty did not exist. As to foreseeability, the court held that judging whether some injury is foreseeable or not requires an inquiry from the position of a reasonable person in the defendant's position concerning the risk of injuring the plaintiff.<sup>100</sup> The court also found that even if the plaintiff's injury was foreseeable, public policy would disfavor finding a duty.<sup>101</sup> While the court did not apply each of the *Monk* factors, it opined that public policy disfavored recognition of a duty that would impose an "undue burden" on drivers, requiring them to position their wheels differently in each intersection so that a possible collision could be avoided if struck from behind.<sup>102</sup>

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<sup>91</sup> *Monk*, 869 A.2d at 187.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 187–88.

<sup>94</sup> *Id.* at 188–89.

<sup>95</sup> *Id.* at 189.

<sup>96</sup> *Id.* at 190.

<sup>97</sup> 54 A.3d 553 (Conn. 2012).

<sup>98</sup> *Id.* at 555–56.

<sup>99</sup> *Id.* at 557.

<sup>100</sup> *Id.* at 559.

<sup>101</sup> *Id.* at 560.

<sup>102</sup> *Id.* at 560–61.

In *DiPietro v. Farmington Sports Arena, LLC*,<sup>103</sup> the plaintiff, who suffered injury after tripping on a carpet defect in the defendant's sports arena, sued the defendant on grounds that the defendant could have foreseen the plaintiff's injury.<sup>104</sup> The trial court held that there was no genuine issue of material fact as to whether the defendant could have foreseen the plaintiff's injury and granted summary judgment for the defense.<sup>105</sup> In affirming, the Connecticut Supreme Court held that the defendant was clearly not able to foresee the nature of the plaintiff's injury, because the hazardous defect was not "visually discoverable," and, therefore, that the defendant owed no duty to prevent that injury.<sup>106</sup> The court further held that the defect would have had to be visually discoverable because the arena, as a business, did not have a duty to protect invitees like the plaintiff from all risks.<sup>107</sup>

In *Ruiz v. Victory Properties, LLC*,<sup>108</sup> the plaintiff sued the defendant, her landlord, for injuries suffered by her child when another child dropped—from a third floor balcony—a piece of concrete debris found on the building premises on the tenant's child.<sup>109</sup> The trial court granted the landlord's motion for summary judgment on grounds that a duty to prevent the tenant's child's injuries did not exist as a matter of law.<sup>110</sup> The Connecticut Appellate Court reversed; the Connecticut Supreme Court affirmed this court's decision.<sup>111</sup> In affirming, the court held that the injuries were "sufficiently foreseeable," though they occurred in an unusual manner, because the victim's injuries "[f]ell squarely along th[e] continuum of harm" that one might expect from the landlord's act of leaving debris on the premises.<sup>112</sup> Notably, the court found no reason to limit the duty when it applied the *Monk* factors. It held that the first two factors favored a duty because "the activity at issue is a tenant's use of the common area of an apartment building . . . as a place for children to play,"<sup>113</sup> that the third was not of serious concern because "[i]t is by no means clear . . . that the plaintiffs will prevail on . . . their claim," and otherwise did not require anything unreasonable of landlords,<sup>114</sup> and that the fourth factor was supported, and not negated, by the decisions of other

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<sup>103</sup> 49 A.3d 951 (Conn. 2012).

<sup>104</sup> *Id.* at 953–54.

<sup>105</sup> *DiPietro v. Farmington Sports Arena, LLC*, No. X07CV054025110S, 2007 WL 23904516, at \*5 (Conn. Super. Ct. July 2, 2007).

<sup>106</sup> *DiPietro*, 49 A.3d at 960.

<sup>107</sup> *Id.* at 959–60.

<sup>108</sup> 107 A.3d 381 (Conn. 2015).

<sup>109</sup> *Id.* at 386–87.

<sup>110</sup> *Id.* at 386.

<sup>111</sup> *Id.* at 394.

<sup>112</sup> *Id.* at 393.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 394.

jurisdictions.<sup>115</sup>

## 2. Discussion

From these cases, it is clear that Connecticut courts assess duty through a two-step analysis. Courts first inquire as to whether the defendant actually foresaw or should have foreseen that harm of the general nature suffered by the plaintiff could result.<sup>116</sup> Subsequently, if the duty is so foreseeable, courts question “whether [as a matter of public policy] the defendant's responsibility for its negligent conduct *should* extend to the particular consequences or particular plaintiff in the case.”<sup>117</sup> Thus, it seems that the *Monk* framework was intended as a flexible statement of the factors that *might* be considered by judges rendering limited duty decisions or simply justifying their decisions on how far a duty extends.<sup>118</sup> In any event, as a general matter, the *Monk* factors come into play once a court determines that some duty would exist given the defendant's ability to foresee the circumstances of the plaintiff's injury.<sup>119</sup> Beyond this Supreme Court jurisprudence, other Connecticut courts have not shown reluctance in applying the *Monk* factors to create limited duties or otherwise define the scope of duty.<sup>120</sup>

Connecticut's approach seems inconsistent with the traditional focus on determining legal duties based on the general duty of reasonable care arising out of the basic relationship between parties, except where a countervailing principle or policy warrants modifying the general duty arising out of the parties' relationship.<sup>121</sup> The analysis seems to involve

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<sup>115</sup> *Id.* at 396.

<sup>116</sup> *E.g.*, *Jaworski v. Kiernan*, 696 A.2d 332, 333 (Conn. 1997).

<sup>117</sup> *Gazo v. City of Stamford*, 765 A.2d 505, 509 (Conn. 2001) (emphasis added).

<sup>118</sup> For the positions of two scholars on what the *Monk* framework was intended to mean, see *infra* Part IV.A.

<sup>119</sup> See *Jaworski*, 696 A.2d at 337 (Conn. 1997). Alternatively, some cases might be disposed without reaching policy simply because a defendant could not be expected to foresee the general nature of the plaintiff's injury.

<sup>120</sup> *E.g.*, *Great Lakes Reinsurance (UK) v. JDCA, LLC*, No. 11-00001-WGY, 2014 WL 6633039, at \*20 (D. Conn. Nov. 21, 2014) (holding that “[t]his test [applying the *Monk* factors] thus points in favor of a holding that Flatiron [a financier who paid a property owner's insurance premiums] owed no duty beyond its contractual obligations,” i.e., a legal duty to notify the property owner that the policy had been cancelled or advance payment itself); *Lopes v. Walgreens E. Co.*, No. NNHCV096004995S, 2012 WL 671412, at \*6 (Conn. Super. Ct. Feb. 7, 2012) (stating that “[p]ublic policy considerations militates for imposing a duty of care on the defendant in this case,” where the defendant, a supermarket, was sued in connection with a vehicle accident on the sidewalk adjoining its property); *Mills v. Solution, LLC*, No. CV075009361, 2010 WL 4722480, at \*12 (Conn. Super. Ct. Nov. 1, 2010) (denying a defendant event organizer's motion for summary judgment concerning the existence of duty to a business invitee as a matter of law where “[i]n applying these four factors [the *Monk* factors,] the court concludes that [*sic*] imposing a duty of care on the defendants under the circumstances of the present case is not inconsistent with public policy”).

<sup>121</sup> RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARMS § 7 (AM. LAW INST. 2005).



many specific facts, with the result that the courts frequently decide issues of fact—breach of duty, and proximate cause—under the guise of determining whether a legal duty exists. The courts’ decisions have these results because many specific facts are inevitably considered under Connecticut’s duty framework.

The first prong of the analysis—concerning whether the defendant could have foreseen the general nature of the plaintiff’s injury—conforms for the most part with the concept that parties owe each other a general duty of reasonable care. For instance, it follows that the defendants in *Monk* would generally be considered able, given their relationship with the plaintiff, to foresee that the plaintiff could be injured at their parking lot. The duty in *Ruiz* follows on similar logic; the landlord could be expected to foresee that a tenant’s child would be injured on the premises. Similarly, it seems reasonable that the defendant in *Sic*, who had little-to-no relationship with his victim, could *not* reasonably be said to owe that plaintiff a duty arising out of an accident that he could not fairly be said to have caused. The logic of *Lodge* seems to make similar sense, because the fire department did not have any relationship with the alarm company; the alarm company, however, might be able to anticipate that injury would result from responding to an alarm, whether or not it was faulty.

The second prong of the analysis is significantly more troubling. Courts seem to use the “public policy” rationale to furnish whatever result they want, with a degree of disregard for whether specific facts play a role in the analysis, and whether the rule created can be applied to future situations. Moreover, at both the trial and appellate level, courts engage in this policy analysis in varying depth, and not all factors seem to be analyzed in each case;<sup>122</sup> the level of detail in which the circumstances giving rise to the injury is discussed in order to reach a result varies from case-to-case. In *Lodge* and *Sic* for instance, the courts respectively indicated that they considered the social costs of imposing duty, and whether duty would be an undue burden, whereas the courts in *Ruiz*, *Monk*, and *Jaworski* gave full treatment of four policy factors to the facts of the case in order to determine whether or not a particular duty extended to the specific defendant who sought dismissal.

Another complication is that the policy factors are used as both a fact-specific sword and shield, that is, to both justify imposing a particular duty, and to justify limiting the general duty. In some cases, such as *Monk* and *Ruiz*, the court finds a duty to be proper based on the relationship between the parties and then discusses why policy favors extending a duty to the specific circumstances of the case, raising the inference that a duty might

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<sup>122</sup> See, e.g., *Vega v. Sacred Heart Univ.*, 836 F. Supp. 2d 58, 63 (D. Conn. 2011) (noting that “[a] brief consideration of [a Connecticut Supreme Court case applying the *Monk* factors] leads this court to conclude that an extension of [limited duty] is not warranted in this case”).

not be extended on a different set of facts, even if a defendant could still foresee the general nature of the plaintiff's harm. This makes it seem that Connecticut courts are moving away from a theory of duty that is as a default based on a general duty to use reasonable care. In other cases, like *Jaworski*, *Lodge*, and *Sic*, even though the case satisfies or might seem to satisfy the first prong of the analysis, and despite the absence of some clearly countervailing legal principle (at least at a higher level of generality), the court applies some or all of the factors to particular facts in order to dismiss a case on the basis of a highly fact-specific limited duty. Cases where public policy is used to limit a duty that could uncontestedly be said to exist on the basis of the relationship between the parties alone—such as a duty to refrain from accidentally injurious rather than intentionally injurious game-play in *Jaworski*—are arguably most troubling, because courts have wide discretion, involving whichever facts they would like to involve, to arrive at the reasons for which a duty is improper as a matter of policy.

In all of these cases, Connecticut courts justify their decisions regarding duty on the basis of specific factual analysis. Courts dismiss cases, often under the guise of summary judgment, on grounds that as a matter of law a duty could not be said to exist. Thus, the case is not submitted to the trier of fact, and, by its dismissal, the court holds *a fortiori* that no reasonable trier of fact could rule for the plaintiff on certain issues of fact. Arguably, since the *Monk* factors can be used to analyze specific facts, Connecticut courts give judges too much discretion to resolve duty issues—issues of law—as mixed issues of fact and law. When this occurs, issues of fact that could inform breach of duty—a question of fact—or otherwise constitute grounds on which a court might deny certain dispositive motions (e.g., summary judgment) quite simply never make it to the fact-finder. Expressed another way, the problem is that there is a possibility that Connecticut courts granting dispositive motions on grounds that as a matter of law a defendant does not owe a plaintiff a duty actually make those decisions on the basis of facts, yet not facts that present a completely one-sided case.

Additionally, Connecticut's approach to limited duty has led to some uncertainty as to whether the consideration of foreseeability in the duty of care analysis impinges upon the consideration of foreseeability as a matter of proximate cause. In Connecticut, “[f]oreseeability is also considered in the context of causation. Proximate cause is ‘[a]n actual cause that is a substantial factor in the resulting harm . . . [t]he fundamental inquiry of proximate cause is whether the harm that occurred was within the scope of

foreseeable risk created by the defendant's negligent conduct.”<sup>123</sup> The issue of proximate cause generally belongs to the trier of fact because causation is generally an issue of fact.<sup>124</sup> Courts will only intervene in this decision if they determine that as a matter of law some identified cause was not foreseeable to the defendant.<sup>125</sup>

Connecticut's approach to limited duty questions seems to have caused some confusion between the form of foreseeability applied in the duty analysis and the role that foreseeability plays in the trier of fact's proximate cause inquiry. When a court concludes that some harm is “foreseeable” to a particular defendant and recognizes a duty, this does not necessarily mean that the defendant's acts or omissions are the proximate cause of the plaintiff's injury. Decisions like *Lodge* and *Sic* suggest that judges might, under Connecticut's duty analysis, co-opt decisions in the name of duty that are more fairly classified as decisions about proximate cause. In *Lodge*, for instance, the court's conclusion with respect to duty that the alarm company could not be expected to foresee the plaintiffs' injury seems more like a decision that the defendant's conduct could not be considered the legal cause of the plaintiff's injury than a judgment about the defendant's ability to anticipate the general nature of the plaintiff's harm, given the relationship between the parties. In ruling that neither the foreseeability nor the public policy factor favored a duty, the court seems to have judged some other cause—brake failure, perhaps—to be the proximate cause of the plaintiff's injury. At the very least, the court has ruled as a matter of law that the alarm company's conduct could not be within the scope of causes that could be decided to be the proximate cause. If the court assessed foreseeability as a matter of legal duty alone, then it might be expected to conclude that the general nature of the plaintiff's harm—a crash after getting an erroneous alert from the defendant's technology—would be foreseeable to the defendant, who after all provided the alarm system that caused the plaintiffs to travel in the dangerous fire engine. Even if the court would later conclude that this defendant's conduct could not be the proximate cause of the plaintiff's injury as a matter of law, the decision should not be made as a matter of duty.

Stated more broadly, the problem with this sort of confusion is that it can have the effect of saying that, where a court finds a limited duty and therefore concludes that some duty does not exist as a matter of law, “the

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<sup>123</sup> *Mirjavadi v. Vakilzadeh*, 74 A.3d 1278, 1288 (Conn. 2012) (quoting *Sapko v. State*, 44 A.3d 827, 836 (Conn. 2012)).

<sup>124</sup> *Stewart v. Federated Dep't Stores, Inc.*, 662 A.2d 753, 761 (Conn. 1995).

<sup>125</sup> *E.g.*, *Doe v. Mannheimer*, 563 A.2d 699, 702 (Conn. 1989) (holding that, because a private landowner could not reasonably foresee that overgrown vegetation would cause a violent criminal assault by a third party on his property, overgrown vegetation was not as a matter of law the proximate cause of the victim's injury).

scope of duty owed [as determined in the duty inquiry, means that] the defendant's conduct *was not* [as a matter of law] the proximate cause [of the injury to the plaintiff],"<sup>126</sup> *even if a reasonable fact-finder could, but for the court's limited duty decision, conclude that the conduct was the proximate cause of the plaintiff's injury.*

### III. THE CONNECTICUT TICK-BITE LITIGATION: *MUNN* AND *HOROWITZ*

#### A. *Munn v. Hotchkiss School*

In the fall of 2006, Cara Munn entered Hotchkiss School, a private secondary school in Lakeville, Connecticut, as a freshman.<sup>127</sup> During her first year at Hotchkiss, Cara learned about the school's summer Chinese Language and Culture Program, which provided students with an opportunity to travel and study in China for one month.<sup>128</sup> Cara enrolled with her parents' approval.<sup>129</sup> After enrollment, her parents were provided with a travel itinerary, encouraged to schedule an appointment for Cara with a travel medicine doctor, given a travel handbook, and provided a checklist that advised students to bring bug spray.<sup>130</sup> Although the travel handbook was generally thorough, it contained no information about the risk of TBI.<sup>131</sup> The travel itinerary indicated that students would visit Mount Panshan—a historical site outside the city of Tianjin—but it did not indicate that Mount Panshan was in a rural, forested area that might contain ticks.<sup>132</sup>

During the trip to Mount Panshan, Hotchkiss's summer director did not instruct students to dress in a manner appropriate for a serious hike.<sup>133</sup> After reaching the top of the mountain, the director permitted Cara and some other students to break from the travel party to trek down the mountain on a woodland path.<sup>134</sup> After becoming lost, the students had to traverse the woods to reach the location where they would rejoin the main travel party.<sup>135</sup> Cara, who was fifteen years old at the time, later recalled developing several bug bites after trekking down the mountain.<sup>136</sup>

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<sup>126</sup> *McDermott v. State*, 73 A.3d 886, 888 n.2 (Conn. App. Ct. 2013) (emphasis added), *rev'd in part, aff'd in part*, 113 A.3d 419 (Conn. 2015).

<sup>127</sup> *Munn Trial*, 24 F. Supp. 3d 155, 164, 171 (D. Conn. 2014).

<sup>128</sup> *Id.* at 164.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 165.

<sup>131</sup> *Id.* For instance, the handbook cautioned students to bring American condoms abroad to avoid risks associated with inferior prophylactic devices. *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* The rest of the travel party took a cable car to the mountain's base. *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* Cara also noticed a welt, and experienced some itchy discomfort on her arms. *Id.* Otherwise, however, she stated that she felt fine after the trip to Mount Panshan. *Id.*

Ten days after the trip to Mount Panshan, Cara began to experience flu-like symptoms.<sup>137</sup> She was transported to a Chinese hospital where her condition deteriorated into paralysis and a coma.<sup>138</sup> Her parents, after being alerted about Cara's condition, traveled to China to arrange for emergency travel to New York, where Cara was admitted to New York Presbyterian Hospital.<sup>139</sup> There, she was diagnosed with a form of TBI known as tick-borne encephalitis (TBE).<sup>140</sup>

Cara Munn suffered serious injuries from TBE. She has lost her ability to speak.<sup>141</sup> She has also lost some fine motor skill dexterity, including in her hands and facial muscles.<sup>142</sup> Additionally, she has suffered diminished executive function, which has affected her ability to apply her intellect to everyday problems.<sup>143</sup>

### 1. *The Trial Court*

In July 2009, Cara's parents filed suit as Cara's next friends in the United States District Court for the District of Connecticut, alleging several counts of negligence against Hotchkiss for failing to protect Cara from TBE while she was in the school's custody.<sup>144</sup> After a seven-day trial, the jury found that the Munns proved that Hotchkiss was negligent in failing to warn Cara of the risk of TBI.<sup>145</sup> As to damages, the jury found Cara 0% negligent for her own injuries and awarded her \$10.25 million in past and future economic damages and \$31.50 million in non-economic damages.<sup>146</sup>

Hotchkiss filed post-trial motions for judgment notwithstanding the verdict, or, in the alternative, a new trial.<sup>147</sup> While Hotchkiss did not contest that it would owe a legal duty to warn Cara of TBI generally and advise her of precautions against contracting it on its Connecticut

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<sup>137</sup> *Id.* at 166.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* Cara's father, New York City advertising executive Orson D. Munn III, later stated that it cost over \$60,000 to airlift Cara to the United States. Laura Landro, *Safety 101 for Summer Jaunts*, WALL ST. J. (July 15, 2009, 1:40 PM), <http://www.wsj.com/articles/SB10001424052970204261704574272140181146368> [<http://web.archive.org/web/20160809032824/http://www.wsj.com/articles/SB10001424052970204261704574272140181146368>].

<sup>140</sup> See *Munn Trial*, 24 F. Supp. 3d 155, 163 (D. Conn. 2014) (identifying the disease which Cara contracted in China). The trial court explained that TBE originates from an attack on the central nervous system that elicits brain and spinal cord swelling that can—and, in Cara's case, did—cause permanent brain damage. *Id.*

<sup>141</sup> *Id.* at 166.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 166–67. Judge Stefan R. Underhill was assigned. *Id.* at 155.

<sup>145</sup> See *id.* at 163.

<sup>146</sup> *Id.* at 155.

<sup>147</sup> *Id.* at 164.

campus,<sup>148</sup> it resisted this duty in the context of a trip abroad by arguing for a fact-specific conception of its legal duties to Cara. Specifically, the school tried to avoid liability on the grounds that it did not owe a duty to prevent Cara's TBE because her injury in China was unforeseeable.<sup>149</sup>

Judge Underhill denied Hotchkiss's post-trial motions in their entirety.<sup>150</sup> The Judge held that Hotchkiss "undoubtedly owed . . . a minor child in its care[] a duty to protect her from known threats to her health and safety [in China]."<sup>151</sup> Specifically, he found that Hotchkiss's argument about foreseeability conflated two distinct concepts: "foreseeable 'harm' as a trigger of legal liability, and 'harm' as a measure of damages," of which only the former, which is more abstract than the form applied in the jury's breach analysis, is within the ambit of legal duty.<sup>152</sup> This reasoning implies that foreseeable harm as a measure of damages—an intensely fact-specific inquiry—is properly reserved to the jury for determination when it assesses whether the defendant breached its standard of care.

Accordingly, Judge Underhill seemed to be a proponent of a generalized duty rule concerning Hotchkiss's legal duties to Cara.<sup>153</sup> "At a minimum," he noted, "Hotchkiss had a legal duty 'to use care . . . [in] circumstances under which a reasonable person [in the defendant's position], knowing what he knew or should have known, would anticipate that harm of the *general nature* of that suffered was likely to result from his act or failure to act.'"<sup>154</sup>

With these principles in mind, the judge found Hotchkiss's challenges to be "more properly understood" as a challenge to jury findings on the *scope* of duty, a question of fact properly reserved to the jury<sup>155</sup> where the verdict was supported by reasonable jury consideration of evidence, credibility, and community standards.<sup>156</sup> Accordingly, Judge Underhill concluded that a limited duty was not proper in this case and that the jury had not reached an unreasonable or inappropriate conclusion in finding that Hotchkiss had breached its standard of care.<sup>157</sup> After denying Hotchkiss's motions, Judge Underhill entered judgment favoring Cara for \$41.465 million.<sup>158</sup> Hotchkiss appealed to the United States Court of Appeals for

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<sup>148</sup> See *id.* at 171 (discussing Hotchkiss's concession regarding its duty of care at its own campus).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 214.

<sup>151</sup> *Id.* (citing CONN. GEN. STAT. § 10-220 (2015)).

<sup>152</sup> *Id.* at 174.

<sup>153</sup> *Id.* at 170 (discussing the general law surrounding duty of care).

<sup>154</sup> *Id.* (citing *Ryan Transp., Inc. v. M&G Assocs.*, 832 A.2d 1180, 1184 (Conn. 2003)) (emphasis added).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 172.

<sup>157</sup> See *id.*

<sup>158</sup> *Id.* at 214. Judgment on the verdict of \$41,750,000.00 was amended and entered as \$41,465,905.39 in light of a joint stipulation regarding collateral source reduction by \$284,094.61—the

the Second Circuit.<sup>159</sup>

## 2. *The Arguments on Appeal*

At the Second Circuit, Hotchkiss argued that the District Court's decision implicated Connecticut public policy questions concerning how foreseeable a defendant's injury must be before public policy itself is analyzed<sup>160</sup> and whether the school should be held to a duty to foresee rare medical problems, possibly deterring travel education in the future.<sup>161</sup> The Second Circuit responded to these arguments by issuing certified questions on Connecticut law to the Connecticut Supreme Court.<sup>162</sup> The court's order contained the following two questions: "[d]oes 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, "[i]f 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?"<sup>163</sup> As of this writing, the Connecticut Supreme Court has yet to reply to these questions.

### a. Limited or General Legal Duties: The Debate Applied

Hotchkiss appealed the trial judge's determination that it owed Cara a legal duty to protect her from TBE carried by Mount Panshan ticks. The school argued that the trial court's conception of legal duty was impermissibly "open-ended," and that the duty assigned did not exist because (1) Cara's injury was unforeseeable, and (2) Connecticut public policy was unsettled.<sup>164</sup>

As to foreseeability, Hotchkiss objected to the trial court's conclusion that negligence might attach to the case without analyzing the foreseeability of Cara's specific injury in China as a component of the duty of care.<sup>165</sup> It claimed that the court failed to consider that party can only be liable for "reasonably foreseeable consequence[s] of [tortious] conduct," which excludes "attenuated result[s]."<sup>166</sup> The school further argued that it could not have foreseen Cara's injury because the CDC had not posted

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amount of past economic damages covered through the Munns' health insurance, less the cost of Cara's health insurance premiums—against the award for past economic damages. *Id.*

<sup>159</sup> Hotchkiss Brief, *supra* note 11.

<sup>160</sup> *Id.* at 27.

<sup>161</sup> *See id.* at 28–32 (applying the *Monk* factors).

<sup>162</sup> *Munn Appeal*, 795 F.3d 324, 337 (2d Cir. 2015).

<sup>163</sup> *Id.* This Note is concerned primarily with the resolution of the first question, upon which the resolution of the second question is contingent.

<sup>164</sup> Hotchkiss Brief, *supra* note 11, at 20–23.

<sup>165</sup> *Id.* at 25.

<sup>166</sup> *Sic v. Nunan*, 54 A.3d 553, 560 (Conn. 2012). Similarly, New York applies a "reasonable care under the circumstances" doctrine, where foreseeability is the measure of liability. *Basso v. Miller*, 352 N.E.2d 868, 872–73 (N.Y. 1976).

advisories regarding the risk of TBE in China.<sup>167</sup> Accordingly, it urged the court not to conflate an “unfortunate risk[] of living on this planet [i.e., contracting TBE in travel to a foreign country, where the nation’s preeminent health authority has not identified a risk]” with that risk being foreseeable because it is *generally* foreseeable that a student who is not warned about TBI might contract a form of it on a school trip to a wooded area.<sup>168</sup> Additionally, in Hotchkiss’s reply brief, the school relied on the Connecticut Supreme Court’s decision in *Ruiz v. Victory Properties, Inc.*<sup>169</sup> as further support for the proposition that Connecticut is adopting a version of foreseeability where a harm like Cara’s TBE from a Mount Panshan tick must be “literally staring the defendant . . . in the face” to count as foreseeable.<sup>170</sup> If this approach were applied, then Cara’s injuries might be said to have been unforeseeable to Hotchkiss, possibly meriting reversal on appeal.

Hotchkiss also argued that public policy merited the creation of a limited duty.<sup>171</sup> Specifically, Hotchkiss advocated for reversal under the *Monk* matrix by arguing that the factors should be resolved as follows: (1) as to normal expectations, schools could not be reasonably expected, in the absence of the CDC’s industry guidance, to warn students like Cara of diseases as rare as TBE; (2) as to the public policy surrounding the activity, the activity of studying abroad provides students with heightened “self-confidence,” and should therefore be encouraged; (3) as to future litigation, *Horowitz*<sup>172</sup> confirms that litigation under a “failure-to-protect rubric” would increase were a legal duty recognized; and (4) as to the decisions of other jurisdictions, other jurisdictions declined to impose a duty in the few

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<sup>167</sup> Hotchkiss Brief, *supra* note 11, at 30–32.

<sup>168</sup> *See id.* Hotchkiss also argued that, since the trial court was unwilling to adopt this perspective on foreseeability, the jury was ultimately confused by an unclear instruction. Within Judge Underhill’s charge, Hotchkiss has identified the sentence “[a]s the gravity of a possible harm increases, the apparent likelihood of its occurrence need be correspondingly less to generate a duty of precaution” as troublesome, because it could have misled jurors into considering a form of foreseeability that it claims is improperly abstract for the negligence analysis. *See id.* at 32 (quoting the trial court’s jury charge regarding negligence). The school further claimed that this conception of foreseeability meant that the jurors could have believed that Hotchkiss did not legally have to foresee Cara’s injuries just because they were so serious. *Id.* at 35–36.

<sup>169</sup> 107 A.2d 381 (Conn. 2015). In this case, a landlord’s negligence in clearing concrete debris from a courtyard was the foreseeable cause of a playing child’s injury. *See id.* The Connecticut Supreme Court ultimately concluded that, for a duty to exist, the plaintiff’s injury had to be foreseeable to the defendant as the “general nature of the harm” and not “the specific way in which the harm occurred.” *Id.* at 391. It appears that Hotchkiss has taken this case to imply that Cara’s injury is properly conceived of as the risk of TBE in China generally, and that this harm, unlike concrete debris, was not foreseeable to the school because it was less conspicuous. *See Reply Brief of Defendant-Appellant Hotchkiss School at 7, Munn v. Hotchkiss Sch., 795 F.3d 324 (2d Cir. 2015) (No. 14-2410-cv).*

<sup>170</sup> Hotchkiss Brief, *supra* note 11, at 30–32.

<sup>171</sup> *Id.* at 26.

<sup>172</sup> For a discussion of this case, see *infra* Part III.B.



cases analogous to *Munn*.<sup>173</sup>

### b. Arguments of the YMCA Camp Mohawk Amici

Forty scholastic and travel entities filed briefs as amici to Hotchkiss,<sup>174</sup> many of which are concerned with the possible implications of this case on international travel education.<sup>175</sup> The defendant in *Horowitz* is among the amici to a jointly authored supporting brief.<sup>176</sup> In its argument for reversal, the YMCA Camp Mohawk amici make several arguments that highlight the possible implications of tick-bite litigation generally.<sup>177</sup>

Interestingly enough, the YMCA Camp Mohawk amici suggest that limited duty is merited simply because “there is not [in Connecticut, a] duty to constantly exercise supervision over children, and . . . older children assume greater responsibility for their own safety than younger

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<sup>173</sup> Hotchkiss Brief, *supra* note 11, at 28–31. As to the fourth factor, Hotchkiss offered *David v. City of New York*, 40 A.D.3d 572 (N.Y. App. Div. 2007), and *Mancha v. Field Museum of Natural History*, 283 N.E.2d 899 (Ill. App. Ct. 1972), for the proposition that it would be improper to impose a legal duty in *Munn*. *Id.* at 31. Indeed, the courts in these cases ultimately did not hold educators liable for injuries incurred by children because the defendant educators could not foresee the harms at issue. The differences between these cases, however, illustrate the procedural distinction between dismissing a case on the grounds of limited duty (thereby precluding it from the jury) and circumventing jury consideration notwithstanding the existence of a general duty (e.g., through summary judgment, directed verdict, or judgment notwithstanding a jury verdict). In *David*, the plaintiff was a child on a school field trip who cut her eyelid on a hayride. *David*, 40 A.D.3d at 573. While the *David* court mentions that the defendant school “established its entitlement to judgment as a matter of law by demonstrating that it did not breach its duty of supervision,” *id.*, that court did not create a limited duty per se. Rather, without limiting or abrogating the ordinary duty incumbent upon the defendant, the *David* court held that summary judgment should have been granted because the defendant proved that it did not breach its duty of reasonable supervision based on its knowledge about the hazards associated with the ride and its past experience with it. *Id.* at 574. In contrast, the court in *Mancha* held that schoolteachers did not have a legal duty to prevent a student from being assaulted in a public museum where allegations did not support “knowledge of a potential danger of an assault on . . . [the museum’s] visitors and [a] corresponding duty to anticipate and guard against it.” *Mancha*, 283 N.E.2d at 704. In other words, the plaintiff’s complaint, which alleged that defendants had “a duty to supervise and discipline [all students on] the . . . museum trip[,] . . . ignore[d] the realities of the situation . . . [and] did not allege sufficient facts on which defendants could be held liable.” *Id.* at 702. Accordingly, the *David* case is simply an example of a situation where a general duty is applied and a trial court later properly dismissed a case in the absence of a genuine dispute of facts, whereas the *Mancha* case is an example of a case where a trial court properly dismissed a case on grounds of limited duty, without sustaining the case to consider whether genuine issues of fact existed or judgment as a matter of law was otherwise merited.

<sup>174</sup> See Docket, *Munn v. Hotchkiss Sch.*, 795 F.3d 324 (2d Cir. 2015) (No. 14-2410-cv).

<sup>175</sup> See, e.g., Hotchkiss Brief, *supra* note 11, at 332–33 (recognizing that “the expectations of the parties depend on the level of generality applied to describe the events . . . in this case”).

<sup>176</sup> Brief for Am. Camp Ass’n, Inc. et al. as Amici Curiae Supporting Appellant, *Munn v. Hotchkiss Sch.*, 795 F.3d 324 (2d Cir. 2015) (No. 14-2410-cv) [hereinafter the YMCA Camp Mohawk Amici Brief].

<sup>177</sup> *Id.* at 12, 14. As the brief cautions, “the issues and facts in *Horowitz* are similar to those here [in *Munn*]; *Horowitz*[,] which] may be affected by this decision[,] . . . may be viewed as merely the opening salvo in a barrage of crippling lawsuits.” *Id.*

children.”<sup>178</sup> Amici also argue that the determination of whether minors should be contributorily negligent for their own injuries should turn on the specific circumstances surrounding a minor’s injury, including his or her age and capabilities.<sup>179</sup> They urge that this realistically means that schools and camps should not reasonably be expected to ensure continuous supervision and control over a teenager in their charge.<sup>180</sup>

Amici suggest that the possibility of contributory fault should be assessed when duty is considered. Specifically, they argue that the amount of self-care that Hotchkiss “could reasonably expect a child of similar age, judgment and experience” to Cara to exercise should inform the duty of care owed to her.<sup>181</sup> They contend that upholding the trial court’s duty would make the school responsible to help Cara “with tying her shoes, brushing her teeth, or applying sunscreen . . . [things that she,] a 15-year-old[] acknowledged to be bright . . . not immature or incapable of making basic decisions,” did not need help with.<sup>182</sup> Amici indicate that a limited duty should be considered for all “ordinary risk[s] associated with natural and obvious conditions . . . [like] being bitten by an insect while outdoors.”<sup>183</sup> Thus, amici reason that a duty does not exist in Connecticut to protect minors of Cara and Ariana’s ages from TBI risks associated with so-called natural and obvious conditions present in the outdoors.<sup>184</sup> Amici

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<sup>178</sup> *Id.* at 17.

<sup>179</sup> *Id.* at 19.

<sup>180</sup> *Id.* at 19, 21 (citing New York case law as persuasive).

<sup>181</sup> *Id.* At trial, the jury found Cara 0% responsible for her own injuries, and, accordingly, the trial court entered judgment entitling her to the full amount of damages awarded by the jury. *Munn Trial*, 24 F. Supp. 3d 155, 193, 214 (D. Conn. 2014). The jury’s finding was not itself raised as an issue for appeal, *see* Hotchkiss Brief, *supra* note 11, at 3 (stating the issues for appeal), even though some of Judge Underhill’s rulings (e.g., on the exclusion of Hotchkiss’s liability waiver) could have been contested to argue for parental contributory fault.

<sup>182</sup> *Id.* at 24.

<sup>183</sup> *Id.* at 25.

<sup>184</sup> *Id.* at 20. Amici alternately question whether Connecticut’s “child-specific” statutory duty, CONN. GEN. STAT. § 10-220, entails a duty to protect children like Cara and Ariana from “outdoor elements.” YMCA Camp Mohawk Amici Brief, *supra* note 176, at 15–16. Judge Underhill held that a such a duty “undoubtedly” applies to Hotchkiss by operation of § 10-220 and related case law. *Munn Trial*, 24 F. Supp. 3d at 170. In pertinent part, CONN. GEN. STAT. § 10-220 states that public and private boards of education “shall provide an appropriate learning environment for students, which includes . . . a safe school setting.” CONN. GEN. STAT. § 10-220(a) (2015). Judge Underhill also cited *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), *Loomis Institute v. Town of Windsor*, 661 A.2d 1001 (Conn. 1995), and *Andreozzi v. Rubano*, 141 A.2d 639 (Conn. 1958) for the proposition that a vaster duty of care beyond the § 10-220 duty may possibly apply to secondary boarding schools through case law. *Munn Trial*, 24 F. Supp. 3d at 170. Amici claim that the cases cited by Judge Underhill are easily distinguished from the context of protecting minors from the outdoor harms at issue in both *Munn* and *Horowitz*. *See* YMCA Camp Mohawk Amici Brief, *supra* note 176, at 15–16 (noting that “[i]n *Vernonia*, . . . [t]he Court’s focus was the power of schools to correct and restrain students . . . *Andreozzi* stands for the limited proposition that public school faculty must maintain discipline . . . [and] *Loomis* is a tax-appeal case, standing for the limited proposition that faculty living at a boarding school are ‘available’ day and night”). Amici assert, for example, that the *Vernonia* case only held that

urge that recognizing a duty in *Munn* would set a precedent forcing “all [p]roviders . . . [to] face unprecedented, ‘heightened’ duties to *all* children in their charge,” deterring participation in outdoor activities that are beneficial as a matter of policy.<sup>185</sup>

The YMCA Camp Mohawk amici’s public policy arguments seem more generalizable to future situations than those presented in Hotchkiss’s brief. Like Hotchkiss, these amici argue from the *Monk* framework that public policy favors imposing a limited duty in *Munn*. Specifically, this group of amici asserted that public policy favored a limited duty for the following four reasons: (1) participants’ reasonable expectations are that children act in accordance with their age, judgment, and experience; (2) public policy favors children spending time in outdoor recreational settings for health reasons, and superfluous warnings have the unintended effect of decreasing safety or attenuating the effect of the most important warnings; (3) litigation will increase, because children will be less inclined to care for themselves, the outdoors is an inherently dangerous place, and insurance costs will skyrocket, restricting organizational defendants’ ability to operate educational programs; and (4) other jurisdictions have demonstrated concern for litigation that deters recreational activity.<sup>186</sup>

Essentially, the amici fear that even “[l]imiting *Munn* to its facts, the potential impact of this case is breathtaking: it may be construed to apply to all children, regardless of age, who sustain bug bites outdoors, worldwide.”<sup>187</sup> From this proposition, amici claim that cases like *Munn* and *Horowitz* will lead to the proliferation of warnings and overzealous guardianship, eventually rendering children unconcerned with and

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schools have the power, but not a duty, to restrain and correct or discipline students. *Id.* at 16; *see also id.* at 16–17 (arguing that the remaining cases cited merely stand for “unhelpful . . . [and] limited proposition[s] . . . [that in effect do no more than] restate[] the general duty of care in Connecticut negligence”). Granted, since § 10-220 seems limited to organizational defendants who are schools, organizational defendants who, like YMCA Camp Mohawk, are not schools per se, would seem to be outside of the scope of this statute. *Cf.* *Bass v. Miss Porter’s Sch.*, 738 F. Supp. 2d 307, 325 (D. Conn. 2010) (asserting that “Connecticut’s *in loco parentis* statute . . . Conn. Gen. Stat. § 10-220(a) . . . applies only to public schools”). Hotchkiss’s argument might have merit. One scholar, for example, has noted that this statute provides for an affirmative duty in the context of safety from violence, but not from risks associated with unintentional torts. *See* Raija Churchill, *Today’s Children, Tomorrow’s Protectors: Purpose and Process for Peer Mediation in K-12 Education*, 13 PEPP. DISP. RESOL. L.J. 363, 364 n.5 (citing a series of state statutes designed to provide for safety in the post-Columbine era). On the other hand, however, this statute has been interpreted as a general prescription of duty. *See, e.g.,* Angela L. Ruggiero, Note, *Mandatory School Uniforms: Restricting Rights or Protecting Pupils?*, 21 QUINNIPIAC L. REV. 691, 711 (2002) (citing cases regarding the application of § 10-220). If courts are convinced that § 10-220 does not impose a duty to prevent unintentional torts, then arguments about the scope of this duty, including limited duty arguments, will likely persist in Connecticut and jurisdictions that have similar statutes, unless coincident duties are found elsewhere.

<sup>185</sup> YMCA Camp Mohawk Amici Brief, *supra* note 176, at 20.

<sup>186</sup> *See id.* at 25–39 (propounding a limited duty policy argument using the *Monk* factors).

<sup>187</sup> *Id.* at 13.

unprepared for their own care.<sup>188</sup> Specifically, they contend that “recognizing a duty of care [in *Munn*] will create an incentive on the part of Providers to warn for innumerable risks . . . dilut[ing] the impact of serious warnings . . . [and] prompt[ing] counterproductive behavior [with the result that] . . . children will be less prepared for the outdoors, and therefore less safe.”<sup>189</sup>

### c. Certification

As discussed above,<sup>190</sup> the Second Circuit ultimately certified questions of law to the Connecticut Supreme Court. Regarding its reasoning for certification, the Second Circuit stated that “balancing these factors [the *Monk* factors; deciding the role that public policy plays in duty questions] is a task primarily for state decision-makers rather than federal courts.”<sup>191</sup> Accordingly, the Second Circuit saw *Munn* as a case that could implicate questions of public policy beyond its facts, because the decision could have the social impact of discouraging educational field trips.<sup>192</sup> Ultimately, the court “agree[d] with the Plaintiffs that there was sufficient evidence for a jury to find Munn’s illness foreseeable, [but held that it was] *unable to determine whether public policy supports imposing a legal duty on Hotchkiss*.”<sup>193</sup> In other words, the Second Circuit indicated that the Connecticut Supreme Court was better suited than it was to say whether Connecticut’s public policy favored a legal duty to protect students from the risks of TBI where such a duty could possibly discourage travel education.<sup>194</sup>

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<sup>188</sup> See *id.* at 34–35.

<sup>189</sup> *Id.*

<sup>190</sup> *Supra* Part III.A.2.

<sup>191</sup> *Munn Appeal*, 795 F.3d 324, 335 (2d Cir. 2015).

<sup>192</sup> *Id.* at 334–35.

<sup>193</sup> *Id.* at 334 (emphasis added). The court applied the *Monk* analysis, and indicated that “[t]he four public policy factors do not point to an obvious answer in this case because both sides present colorable arguments on either side.” *Id.* at 332.

<sup>194</sup> *Id.* In certifying its questions, the Second Circuit declined to address some of Hotchkiss’s arguments. See *Munn Appeal*, 795 F.3d at 337 (stating that “we [the Second Circuit] address only the duty question and remittitur . . . we do not reach the other issues raised in this appeal because the Connecticut Supreme Court’s answers . . . could be determinative”). Specifically, the court did not address whether the trial court’s jury charge was misleading, whether the trial court erroneously excluded a key defense expert while admitting several of plaintiff’s experts, arguments regarding causation, and an argument concerning the validity of a liability waiver that Cara’s parents signed prior to her trip. *Id.* at 329 n.1. While the court did conclude that there was *sufficient* evidence to support the jury’s conclusion that Cara’s injuries were foreseeable to Hotchkiss, it indicated that it resolved this issue in favor of the appellee just because “*Connecticut* courts construe foreseeability broadly, *especially* as it relates to children,” and because of some inconsistencies in evidence regarding the information about TBE that was actually known to Hotchkiss around the time of Cara’s trip. *Id.* at 341 (emphasis added). Given this appellate posture, many of Hotchkiss’s points regarding the standard of care could remain unanswered. While the Second Circuit has retained jurisdiction over the appeal, it has indicated that the Connecticut Supreme Court’s answers on the public policy questions could be

## B. Horowitz v. YMCA Camp Mohawk, Inc.

*Horowitz* is similar to *Munn* in a number of ways. Both cases involved TBI injuries suffered by minors. In addition, the lead plaintiff's counsel in both cases is Antonio J. Ponvert III.<sup>195</sup> Further, Plaintiffs—two parents suing as their child's next friends<sup>196</sup>—demand \$41.75 million as damages<sup>197</sup>—the amount that a jury awarded Cara Munn.<sup>198</sup> The Second Circuit took notice,<sup>199</sup> and, perhaps thinking this uncanny, the Defendant moved (unsuccessfully) to stay trial pending the resolution of the certified questions in *Munn*.<sup>200</sup> As of this writing, the case is proceeding to trial, having reached discovery in February 2016.<sup>201</sup>

During the summer of 2011, Ariana Sierzputowski, age fifteen, attended YMCA Camp Mohawk for Girls, a Litchfield, Connecticut sleep-

determinative. *Id.* at 337. Accordingly, while the Second Circuit can “decide any remaining issues once the Connecticut Supreme Court has ruled,” *id.*, it is clear that the Supreme Court's answers might be dispositive of the appeal. This could have the consequence of keeping legal communities in the Second Circuit guessing about the tenability of Hotchkiss's arguments, as applied to the facts of their cases and the analogous laws of their jurisdictions. It also creates some uncertainty about the persuasiveness of limited duty arguments generally.

<sup>195</sup> Of Bridgeport, Connecticut's Koskoff, Koskoff & Bieder, P.C. *Compare, e.g., Munn Trial*, 24 F. Supp. 3d 155, 163 (D. Conn. 2014) (stating the names of Plaintiffs' counsel), *with Horowitz Compl.*, *supra* note 12, at 17 (stating a prayer for relief).

<sup>196</sup> *See Horowitz Compl.*, *supra* note 12, at 1 (stating an introduction).

<sup>197</sup> *See id.* at 15 (stating a prayer for relief).

<sup>198</sup> *See Munn Trial*, 24 F. Supp. 3d at 214 (denying post-trial motions and entering judgment).

<sup>199</sup> *See Munn Appeal*, 795 F.3d 324, 333 (2d Cir. 2015) (noting that “Munn's attorney recently brought another lawsuit in which the plaintiff seeks the same damages award for contracting Lyme disease”).

<sup>200</sup> Conference Memorandum & Order at 1, *Horowitz v. YMCA Camp Mohawk, Inc.*, No. 3:13-cv-01458-SRU (D. Conn. Sept. 1, 2015), ECF No. 81. Among other things, Defendant insisted that the Connecticut Supreme Court's resolution of the certified question concerning legal duty “may dispose of most, if not all, of the plaintiffs' negligence claims. It may confirm as a matter of law that the defendant did not owe the plaintiffs a duty to warn or protect Ariana Sierzputowski from contracting a tick-borne disease while she attended summer camp.” Motion for Stay of Trial at 5, *Horowitz v. YMCA Camp Mohawk, Inc.*, No. 3:13-cv-01458-SRU (D. Conn. Aug. 18, 2015), ECF No. 76. While Judge Underhill's memorandum order does not specify the reasons why the motion was denied in conference (i.e., it only memorializes the denial), one possible inference is that the Judge perceived the facts of this case to be distinguishable from the facts of *Munn* because the Plaintiffs' apparent injuries here occurred in Connecticut, on the defendant's campus, *see Horowitz Compl.*, *supra* note 12, ¶¶ 5, 14–15 (alleging that Ariana's injuries occurred on the camp's premises in Connecticut), where the existence of a duty of care to prevent TBI is settled irrespective of the Connecticut Supreme Court's resolution of the certified questions in *Munn*.

<sup>201</sup> *See Minute Entry*, *Horowitz v. YMCA Camp Mohawk, Inc.*, No. 3:13-cv-01458-SRU (D. Conn. Feb. 19, 2016), ECF No. 144 (indicating that discovery is open, and commanding counsel to submit their trial availability through November 2016). Six-hour long settlement proceedings were held before U.S. Magistrate Judge William I. Garfinkel on July 1, 2015, but the case did not settle. Minute Entry, *Horowitz v. YMCA Camp Mohawk, Inc.*, No. 3:13-cv-01458-SRU (D. Conn. July 1, 2015), ECF No. 68. Another settlement conference before Judge Garfinkel has been docketed for July 12, 2016. Notice of E-Filed Calendar, *Horowitz v. YMCA Camp Mohawk, Inc.*, No. 3:13-cv-01458-SRU (D. Conn. Mar. 9, 2016), ECF No. 148.

away camp.<sup>202</sup> Plaintiffs allege that a deer tick attached to Ariana's upper left arm sometime that summer, leading to TBI.<sup>203</sup> Specifically, they claim that the camp failed to warn Ariana to wear "tick-bite protective clothing" before participating in activities "outside of the core and mowed areas of the camp," to instruct her to apply bug repellent, and to educate her—she grew up in New York City—about the risks that ticks pose.<sup>204</sup>

Plaintiffs' principal claim for relief concerns the camp's alleged deviation from its own protocol. The camp did present Ariana's parents with a booklet on Lyme Disease that described its internal protocol to prevent campers from contracting TBI.<sup>205</sup> The camp's follow-through on this protocol, however—namely, the staff's diligence in monitoring Ariana, discovering her illness, and reporting it to her parents—is what is at issue.<sup>206</sup>

Plaintiffs allege that Ariana missed fifty-two days of tenth grade and forty-five days of eleventh grade because of her TBI, a situation that means that she will not graduate high school on time.<sup>207</sup> Her earning capacity is allegedly compromised by her symptoms, which will apparently lead to future medical expenses and loss of enjoyment of life's activities.<sup>208</sup> And none of this, plaintiffs insist, would have happened without the camp's violation of its "duty and responsibility . . . [standing] *in loco parentis* [to Ariana] . . . to do everything in its power to keep [Ariana] safe and protected from disease . . . [while] in [its] sole care and custody."<sup>209</sup>

#### IV. ANALYSIS, RECOMMENDATIONS, AND FUTURE IMPLICATIONS

The facts of *Munn v. Hotchkiss School* confirm that litigating the duty of care appropriate in TBI situations can be contentious. After all, through the so-called *ferae naturae* principle, courts have frequently held that property owners generally do not owe a duty to protect others from injuries

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<sup>202</sup> Horowitz Compl., *supra* note 12, ¶ 5.

<sup>203</sup> *See id.* ¶ 14 (claiming that the deer tick nymph attached to Ariana on or around July 18, 2011). In the alternative, Plaintiffs plead that one or more ticks attached to Ariana's body while she was in the camp's care during either July or August 2011. *See id.* ¶ 15.

<sup>204</sup> *Id.* ¶¶ 16, 21. Plaintiffs go on to assert that "appropriate tick bite protective clothing" includes light-colored clothes, and pants tucked into socks. *Id.* ¶ 17. Plaintiffs also assert that proper bug spray is "repellent containing DEET." *Id.* ¶ 19.

<sup>205</sup> *Id.* ¶ 10. The protocol purported that campers would be inspected for ticks daily by camp counselors while in states of undress, and that campers would be instructed prior to activities outside of mowed areas to apply bug spray and wear long pants and sneakers. *Id.*

<sup>206</sup> *Id.* ¶¶ 11–13, 16, 18–19, 39–40. Plaintiffs also assert a claim against the camp's two-nurse medical staff, alleging that they failed to treat Ariana over a course of ten or more infirmary visits for "obvious signs and symptoms of Lyme Disease and other tick-borne disease." *Id.* ¶ 26.

<sup>207</sup> *Id.* ¶ 45.

<sup>208</sup> *Id.* ¶¶ 41–45 (first claim of relief); *id.* ¶¶ 27–31 (second claim of relief).

<sup>209</sup> *Id.* ¶¶ 6–8 (first claim of relief).

caused by wild, indigenous animals on their property.<sup>210</sup> Under this principle, most private landowners would not, as a matter of law, likely be liable to persons injured by TBI on their property, precluding submission of a TBI suit to the jury.<sup>211</sup> In other contexts, however, this traditional rule does not apply; an institution *seems* to be assigned a duty under either statute or case law to prevent those in its custody from contracting TBI.<sup>212</sup>

The Second Circuit's decision to certify a question to the Connecticut Supreme Court regarding whether "Connecticut public policy support[s] 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"<sup>213</sup> suggests that limited duties are possible in TBI cases where a duty would conventionally be recognized. In other words, the Second Circuit has asked Connecticut whether concerns about public policy and foreseeability merit modifying default rules of duty law.<sup>214</sup>

Limited duty rules have no place in TBI cases with facts like those in *Munn* and *Horowitz*. The law concerning the existence of duty in these situations is settled. Neither case has facts that would merit finding *as a matter of law* that no duty should apply to the injuries in these cases. Rather, both situations were foreseeable enough to the defendants to satisfy the general level of foreseeability required at this juncture. As far as policy is concerned, courts should not defer at this phase to public policy arguments that urge consideration of specific facts where settled matters of law—like whether a school should protect a student from a peril of a general nature that it could have foreseen—are concerned, unless this analysis reveals some extraordinary reason for denying duty. Anything else deprives the jury of control over issues of fact (e.g., determining breach

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<sup>210</sup> See, e.g., *St. Joseph's Hosp. v. Cowart*, 891 So. 2d 1039, 1041 (Fla. Dist. Ct. App. 2004); *Nicholson v. Smith*, 986 S.W.2d 54, 60–63 (Tex. App. 1999). Courts have recognized a narrow exception to the *ferae naturae* doctrine where wild animals commit injuries in places where they are not normally found and a landowner knows or should know that such creatures pose an unreasonable risk of harm and are found there. See *Simmons v. Fla. Dep't of Corr.*, No. 5:14-cv-438-Oc-39PRL, 2015 WL 3454274, at \*4–7 (M.D. Fla. May 29, 2015) (finding that an inmate bitten by a tick while imprisoned had pled sufficient facts to survive a state Corrections Department's Rule 12(b)(6) motion on the existence of a duty of care to eliminate ticks from the prison's premises or warn of their existence).

<sup>211</sup> In other words, a court is unlikely to recognize a legal duty in such cases, and defendants are likely to prevail on a motion to dismiss.

<sup>212</sup> E.g., CONN. GEN. STAT. § 10-220 (2015) (assigning schools a duty of care to protect students from known threats to their health and safety).

<sup>213</sup> *Munn Appeal*, 795 F.3d 324, 337 (2d Cir. 2015).

<sup>214</sup> See John C.P. Goldberg & Benjamin C. Zipursky, *A School's Duty of Care to its Students: Munn v. Hotchkiss School*, NEW PRIVATE L. (Aug. 26, 2015), <https://blogs.law.harvard.edu/nplblog/2015/08/26/a-schools-duty-of-care-to-its-students-munn-v-hotchkiss-school-goldberg-zipursky/> [<https://perma.cc/N9LR-TQVA>] (identifying limited duty as a slippery slope that could permit courts to deny or impose duty on any policy grounds that they would like to select—at worst, making the element of legal duty a live arena for judicial and legal sophistry in each case).

and deciding on proximate cause), engenders the creation of limited duty rules that are not general enough to apply in future situations, and also improperly circumvents proper procedure for ruling on facts under limited circumstances where reasonable minds cannot differ (e.g., through summary judgment).

### A. Assessing the Arguments Raised in the Munn Appeal

The Second Circuit's decision to certify a question of public policy at this juncture suggests that limited duty for TBI cases could be persuasive across the entire circuit, because the court might either construe a constituent state's public policy to merit dismissal of a case on the basis of limited duty or opt to certify questions where similar questions of state law exist. This is problematic in two ways.

First, Hotchkiss's public policy argument (i.e., that recognizing a legal duty would encourage litigation against schools traveling abroad) might not be the sort of public policy analysis that *Monk* calls for. Scholars John C.P. Goldberg and Benjamin C. Zipursky believe that Connecticut never intended the *Monk* factors to be applied to subsequent cases to argue in favor of a limited duty.<sup>215</sup> Rather, they believe that the decision—in which a limited duty argument was ultimately rejected—was only meant to confirm state policy and disapprove old precedents holding that businesses operating in high-crime areas did not owe patrons legal duties to protect them from crime.<sup>216</sup> This reading of *Monk* suggests that the case's policy factors should not be used by attorneys to argue that negligence claims should be dismissed under limited duties.<sup>217</sup> While Connecticut courts have certainly not shown reluctance in applying the *Monk* factors to create limited duties and otherwise define the scope of duty,<sup>218</sup> Goldberg and

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<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* By reference to one common idiom, it could be said that the *Monk* factors were intended as a shield to prevent limited duty dismissal and not as a sword for appellants like Hotchkiss to argue for it.

<sup>218</sup> *E.g.*, *Great Lakes Reinsurance (UK) v. JDCA, LLC*, No. 11-00001-WGY, 2014 WL 6633039, at \*20 (D. Conn. Nov. 21, 2014) (holding that “[t]his test [applying the *Monk* factors] thus points in favor of a holding that Flatiron [a financier who paid a property owner’s insurance premiums] owed no duty beyond its contractual obligations,” i.e., a legal duty to notify the property owner that the policy had been cancelled or advance payment itself); *Lopes v. Walgreens E. Co.*, No. NNHCV096004995S, 2012 WL 671412, at \*6 (Conn. Super. Ct. Feb. 7, 2012) (stating that “[p]ublic policy considerations militates for imposing a duty of care on the defendant in this case,” where the defendant, a supermarket, was sued in connection with a vehicle accident on the sidewalk adjoining its property); *Mills v. Solution, LLC*, No. CV075009361, 2010 WL 4722480, at \*12 (Conn. Super. Ct. Nov. 1, 2010) (denying a defendant event organizer’s motion for summary judgment concerning the existence of duty to a business invitee as a matter of law where “[i]n applying these four factors [the *Monk* factors,] the court concludes that [*sic*] imposing a duty of care on the defendants under the circumstances of the present case is not inconsistent with public policy”).



Zipursky's point stands for the proposition that a fair reading of the relevant legal precedents concerning when limited duties are proper should dominate the policy analysis. This approach might make it easier to identify the legal principles that could merit a limited duty. Courts that follow this approach likely create limited duty rules that can be generalized for application in future situations.<sup>219</sup>

Second, evaluating public policy in the manner requested by Hotchkiss implicates questions of mixed fact and law at a stage that is supposed to be concerned solely with questions of law.<sup>220</sup> Hotchkiss's reasoning implies that the jury's foreseeability analysis—what Zipursky has called “foreseeability in breach”<sup>221</sup>—can be wrongly foreclosed through a limited duty decision rendered on public policy grounds. For Goldberg and Zipursky, “the unforeseeability of tick-borne encephalitis [in *Munn*] (if it was unforeseeable) may have raised a breach question, but it did not raise a duty question.”<sup>222</sup> Rather, Goldberg and Zipursky see Hotchkiss's appellate arguments about duty as “straddling two questions,” one which actually concerns the existence of legal duty, with the other, concerning foreseeability and Connecticut's public policy, being “a mixed question of law and fact . . . for the jury to decide.”<sup>223</sup> Accordingly, these scholars have characterized Hotchkiss's position on its duty to Cara Munn as “insidious . . . [and] illustrat[ive of] the dangers of a common but problematic way of thinking about the duty element of a negligence tort.”<sup>224</sup> They opined that “[t]he District Court [was] exactly right to [rule] that *of course* a school owes a minor student a duty of care to protect her against physical injuries that might arise in the course of . . . a trip.”<sup>225</sup>

Indeed, this muddling raises the serious risk of taking questions of fact—for instance, whether Cara's TBE was foreseeable to Hotchkiss in light of the specific facts of her injury, or whether Hotchkiss's failures to warn Cara about TBE risks were the proximate cause of her injury—from the jury on policy grounds. If a limited duty rule were created in *Munn*, it

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<sup>219</sup> For one example of this sort of precedential treatment of limited duty determinations, see *Vega v. Sacred Heart Univ.*, 836 F. Supp. 2d 58, 63 (D. Conn. 2011) (noting that “[a] brief consideration of [a Connecticut Supreme Court case applying the *Monk* factors] leads this court to conclude that an extension of [limited duty] is not warranted in this case”).

<sup>220</sup> Goldberg & Zipursky, *supra* note 214.

<sup>221</sup> See Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 WAKE FOREST L. REV. 1247, 1249–54 (2009) (opining that foreseeability is really determined at three points in a litigation: first, as a component of the trial court's determination of legal duty; second, in the trier of fact's determination of whether or not a breach of the incumbent standard of care has occurred; and third, in the trier of fact's determination of whether or not some harm was causally proximate to a putative victim's injury, and discussing this analysis under the Third Restatement of Torts).

<sup>222</sup> Goldberg & Zipursky, *supra* note 214.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

would probably be based on very specific facts, and would not likely have precedential worth in future TBI cases and other relevant disputes. A limited duty rule absolving Hotchkiss of liability in *Munn* would probably be inapplicable to *Horowitz*, because it would likely contain too many facts about Cara's foreign injury to apply in other circumstances where the duty to care for minors in custody exists,<sup>226</sup> and the rule would probably reflect a narrow policy principle about rare injuries occurring in foreign countries—one that provides no guidance to cases that do not have such particular facts. Advocates of limited duty in these cases might argue that TBI is exceptional enough to merit a judge-made, case-specific exception to the duty of care. The flaw with this argument is that, as the Second Circuit confirmed in *Munn*, “Connecticut decisions construe foreseeability [as it is considered in the duty of care phase] broadly,”<sup>227</sup> all rules about duty should focus on whether one party would have an obligation to prevent another party from experiencing an injury of a certain general nature, given the relationship between the parties. Accordingly, courts should not import many specific facts from a case in order to pass judgment upon the specific manner in which an accident happens. Rather, where the general nature of the plaintiff's injury is foreseeable to a defendant and there is not a policy reason apparent at this level of generality to create a limited duty<sup>228</sup>—for instance, that imposing liability would lead to absurd results in future cases, or that it would clearly be contrary to some established principle of law or policy—then the general

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<sup>226</sup> See, e.g., RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARMS § 40 (AM. LAW INST. 2012) (recognizing that “[a]n actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship”). Additionally, property owners like YMCA Camp Mohawk have been found liable for the acts of a wild animal or pest if they could foresee that such a pest would injure a victim. See Brief of Nat'l Ass'n of Ind. Schs. Et al. as Amici Curiae in Support of Defendant-Appellant Hotchkiss Sch. At 23–25, *Munn v. Hotchkiss Sch.*, 795 F.3d 324 (2d Cir. Oct. 21, 2014) (No. 14-2410-cv), <http://www.acenet.edu/news-room/Documents/Amicus-Munn-Hotchkiss.pdf> [<https://perma.cc/FU4T-GA76>]. If TBI was more foreseeable to YMCA Camp Mohawk in *Horowitz* than it was to Hotchkiss in *Munn*, then a rule limiting Hotchkiss's duty should not be used to limit YMCA Camp Mohawk's.

<sup>227</sup> *Munn Appeal*, 795 F.3d 324, 330 (2d Cir. 2015) (quoting *Ruiz v. Victory Props., LLC*, 107 A.3d 381, 391 (Conn. 2015), for the proposition that “as long as harm of the general nature as that which occurred is foreseeable there is a basis for liability even though the manner in which the accident happens is unusual, bizarre or unforeseeable”).

<sup>228</sup> The extraordinariness needed to merit limited duty on the basis of the general facts from the foreseeability analysis was noted in *Sic v. Nunan*, 54 A.3d 553 (Conn. 2012). In that case, the Connecticut Supreme Court noted that the general “circumstances . . . [of the defendant's positioning car wheels] in a certain manner while waiting at an intersection” did not, to the extent that such a harm was foreseeable, merit imposing liability as a matter of policy, because imposing a duty to “make a determination of which direction the wheels of a vehicle should be positioned in the multitude of potential intersection situations is very difficult, if not impossible, for drivers to ascertain.” *Sic v. Nunan*, 54 A.3d 553, 560–61 (Conn. 2012). In other words, courts should inquire whether in light of the sort of foreseeability assessed in the first part of the duty analysis imposing liability would lead to absurd results, or results contrary to some clear public policy.

duty should be imposed.<sup>229</sup> Courts in limited duty cases should realize that both judge and jury can assess foreseeability and policy. The jury's assessments should be highly fact-specific, determining whether breach has occurred, whether the defendant's act or omission is proximate to the plaintiff's injury, and whether community standards have been violated, whereas the judge's should be guided by more general principles that do not bear on the actual facts of the case, but rather the relationship between the parties. Notably, the Restatement (Third) of Torts takes positions that support framing the limited duty analysis in this fashion. As the Restatement asserts, limited duties are appropriate only in "exceptional cases . . . where an articulated countervailing principle or policy warrants denying or limiting liability."<sup>230</sup> By reserving limited duties for exceptional cases where liability for some harm arising out of the relationship between the parties is unreasonable, judges will not improperly deprive the trier of fact of control over issues of fact. Moreover, where there are no issues of fact over which the jury could reasonably differ, recognizing a legal duty does not foreclose a defendant's chance of prevailing on a motion for summary judgment, directed verdict, or judgment notwithstanding a verdict.<sup>231</sup> While it is arguable that "the role of the common-law judge centrally involves making moral duties into legal ones,"<sup>232</sup> this should occur prudentially—that is, to absolve liability where it would clearly be unreasonable or exceptional to recognize it across an array of situations, with an eye to future implications, and without focus on the particular facts of one case.

If the duty inquiry is framed in this manner, there is not likely a properly "articulated countervailing principle or policy"<sup>233</sup> meriting a fact-specific rule against liability in either of the TBI cases. The circumstances involving educational care for minors generally carry the duty to protect against TBI, and, at this level of generality, there is not a clear reason not to impose duty in either case. Even proponents of limited duty maintain that these rules must be "general enough to guide future conduct in similar

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<sup>229</sup> The converse of this position is that limited duties should be imposed where some defendant's injury is generally foreseeable and public policy does not favor imposing liability.

<sup>230</sup> RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARMS § 7(b) (AM. LAW INST. 2005). Similarly, "dut[ies] of reasonable care [arise] with regard to risks that arise within the scope of relationship[s] owed between] . . . a school with its students . . . [and] a custodian with those in its custody . . . [as] required by law or [undertaken] voluntarily and [where] the custodian has a superior ability to protect the other." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARMS § 40 (AM. LAW INST. 2012) (emphasis added).

<sup>231</sup> The New York Second Department appellate decision in *David v. City of New York*, 40 A.D.2d 572 (N.Y. App. Div. 2007), is an example of a situation where a general legal duty was recognized and a defendant was entitled to summary judgment upon "demonstrating that it did not breach its [general, not limited] duty of supervision." *Id.* at 573.

<sup>232</sup> Ernest J. Weinrib, *The Case for a Duty of Rescue*, 90 YALE L.J. 247, 263 (1980).

<sup>233</sup> RESTATEMENT (THIRD) OF TORTS § 7(b).

situations”<sup>234</sup> so that the rules should not turn on specific facts. In contrast, it would seem more reasonable to create a limited duty to prevent private homeowners from being sued for guests’ TBI, because this limitation would conform to the already-established *ferae naturae* doctrine<sup>235</sup> and could be generalized for future tick suits. In other words, a suit alleging that a private homeowner is liable for a plaintiff’s contracting TBI on his or her property would be properly dismissed on policy grounds—not foreseeability grounds—because the *ferae naturae* doctrine amounts to, in the words of the Restatement, “an articulated countervailing principle or policy.”<sup>236</sup> Moreover, the relationship between a private homeowner and an invited guest, unlike the relationship between a minor student in the custody of an educator and the educator, should not be said to include an affirmative obligation to prevent injuries by wild creatures, including ticks.

In most cases where plaintiff minors are injured in the care of custodial defendants, it is clear that a custodial party owes a legal duty to protect minors in their care.<sup>237</sup> Courts should therefore defer questions of foreseeability and proximate causation to the jury, even if this means ceding some policy analysis to the jury. Since duty is simply the threshold analysis in a negligence claim,<sup>238</sup> fact issues of breach should not be decided at this juncture. These issues include the appropriate precautions that reasonably prudent actors undertake and the degree to which an actor’s tortious acts or omissions are foreseeable to the actor or proximate to the victim’s injury.<sup>239</sup> Accordingly, judges should take extreme care not to make rules that impinge upon “the meat and potatoes of jury decision-making . . . [determining] whether [a] precaution that the plaintiff said the defendant failed to take was one that a reasonable person under the circumstances should have taken.”<sup>240</sup> Doing so will show respect for the distinct roles of judge and jury in determining—through assessments of

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<sup>234</sup> Twerski, *supra* note 37, at 21 (quoting Dilan A. Esper & Gregory C. Keating, *Putting “Duty” in Its Place: A Reply to Professors Goldberg and Zipursky*, 41 LOY. L.A. L. REV. 1225, 1226 (2008)).

<sup>235</sup> For a discussion of the *ferae naturae* doctrine, see *supra* Introduction to Part IV and note 212.

<sup>236</sup> RESTATEMENT (THIRD) OF TORTS § 7(b). The general nature of the harm could be painted in very broad strokes. For instance, even if a court found that a defendant private property owner should have foreseen that having a plaintiff invited guest on his tick-infested premises would cause the harm of TBI, dismissing the case on policy grounds—namely, that the *ferae naturae* rule is a principle that militates against liability for private homeowners—would be justifiable on just these bare facts.

<sup>237</sup> *E.g.*, RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARMS § 40 (AM. LAW INST. 2012).

<sup>238</sup> Esper & Keating, *supra* note 13, at 265–66.

<sup>239</sup> See, e.g., Stephen D. Sugarman, *Misusing the “No Duty” Doctrine in Torts Decisions: Following the Restatement (Third) of Torts Would Yield Better Decisions* 25 (Oct. 31, 2015), [http://papers.ssm.com/sol3/papers.cfm?abstract\\_id=2690393](http://papers.ssm.com/sol3/papers.cfm?abstract_id=2690393) [https://perma.cc/L2CP-V68T] (discussing the problems with an expansive limited duty concept).

<sup>240</sup> *Id.* at 12–13.

foreseeability and policy—whether damages are due to a plaintiff.<sup>241</sup> Accordingly, dismissing litigation on limited duty grounds should be avoided—unless there are extraordinary circumstances where principles or precedent clearly indicates that the suit is not merited—because it forecloses the jury’s assessment of community standards of care.<sup>242</sup>

### B. *Other Potential Limits on Tick-Bite Liability*

Even where courts decline to impose a limited duty, defendants can raise a number of arguments at trial to relieve or limit liability.<sup>243</sup> In any event, a court may identify several legal bases to impose a duty, or, stated otherwise, find that a defendant owes a plaintiff several duties. Thus, even if a court imposes a limited duty with respect to one obligation that a defendant owes to a plaintiff, that defendant might owe other duties to a plaintiff. Alternatively, the court might simply take the applicability of several theories of liability into account to avoid formulating a limited duty.<sup>244</sup> This Section will analyze how the arguments on appeal in *Munn* might apply in *Horowitz*, assess the limits of legal liability in tick-bite cases where a court declines to dismiss an action on a finding of limited duty, and identify the limitations on affirmative duties to prevent TBI.

#### 1. *Plaintiff’s Age and Contributory Negligence*

Cara Munn was fifteen when she was injured.<sup>245</sup> Ariana Sierzputowski was also fifteen when she was allegedly harmed.<sup>246</sup> Both were from New York City, and both were injured in rural environments.<sup>247</sup> Notably, both complaints allege that the victims were relatively inexperienced in the outdoors.<sup>248</sup>

Contributory negligence was among the special defenses asserted by

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<sup>241</sup> See Goldberg & Zipursky, *supra* note 214 (explaining that “[t]he duty question obviously bears on whether damages will be paid, but it [itself] is not about damages”).

<sup>242</sup> See Sugarman, *supra* note 239, at 8 (arguing that the California Supreme Court should not have dismissed *Verdugo v. Target*, 327 P.2d 774 (Cal. 2014)).

<sup>243</sup> In addition to the tactics discussed in this section, defendants can, of course, raise several dispositive motions, including motions for summary judgment, directed verdict, and judgment notwithstanding a jury verdict.

<sup>244</sup> *E.g.*, *Lodge v. Arett Sales Corp.*, 717 A.2d 215, 219 (Conn. 1998) (stating that “[t]he nature of the duty, and the specific persons to whom it is owed, are determined by the circumstances surrounding the conduct of the individual”); *Strauss v. Bell Realty Co.*, 482 N.E.2d 34, 36 (N.Y. 1985) (noting that “it is still the responsibility of courts, in fixing the orbit of duty, to limit the legal consequences of wrongs to a controllable degree and to protect against crushing exposure to liability” (quoting *Tobin v. Grossman*, 249 N.E.2d 419, 424 (N.Y. 1969))).

<sup>245</sup> *Horowitz Compl.*, *supra* note 12, ¶ 15.

<sup>246</sup> *Id.* ¶ 5.

<sup>247</sup> For further discussion of Cara and Ariana’s backgrounds and injuries, see *supra* Part III.A.1 and Part III.B, respectively.

<sup>248</sup> See *id.*

YMCA Camp Mohawk in its answer to the *Horowitz* complaint.<sup>249</sup> In Connecticut, a finding of contributory fault proportionately reduces a victorious plaintiff's damages award if the plaintiff is found to be fifty percent or less at fault for his or her injuries; if the plaintiff's fault is determined to be in excess of fifty percent of fault, the plaintiff cannot recover.<sup>250</sup> In contrast, in New York, a plaintiff's recovery is never barred—i.e., it is only set off by the amount of contributory fault that the jury has found.<sup>251</sup>

This defense will very likely have some influence in *Horowitz* and in other tick-bite cases in which a limited duty is not imposed. The defense, however, arguably also has a role to play in the limited duty analysis. Therefore, the arguments concerning this defense are important where limited duty arguments are being made and where courts decline to find limited duty.

There is interplay between the first prong of the YMCA Camp Mohawk amici's *Monk* policy argument and the contributory negligence defense.<sup>252</sup> This prong concerns the normal expectations of participants in the activity at issue in the litigation.<sup>253</sup> It can be used, for example, to argue about the normal expectations that caregivers have concerning a minor's ability for self-care. Accordingly, in jurisdictions that recognize limited duties on a theory identical or similar to the *Monk* analysis, organizational defendants might first make use of their prospective contributory negligence defenses to argue for limited duty. In *Horowitz*, for example, YMCA Camp Mohawk might assert that it expected that Ariana, at age fifteen, would care for herself enough to prevent TBI. Furthermore, it might claim that the facts of the case weigh in favor of a limited duty because Ariana could not reasonably assert negligence against the Camp without implicating her own breach of the standard of care normally associated with being her age. Since minors are generally held, however, to a standard of self-care that is proper for a reasonable person of "like age, intelligence and experience under the circumstances,"<sup>254</sup> whether or not

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<sup>249</sup> Answer & Fifth Special Defense, at 13–14, *Horowitz v. YMCA Camp Mohawk, Inc.*, No. 3:13-cv-01458-SRU (D. Conn. Aug. 7, 2014), ECF No. 33.

<sup>250</sup> See CONN. GEN. STAT. § 52-572o (1984).

<sup>251</sup> See N.Y. C.P.L.R. § 1411 (McKinney 1975).

<sup>252</sup> YMCA Camp Mohawk Amici Brief, *supra* note 176, at 26–27 (asserting that "[n]ormal expectations [of participants in an activity that has led to a tort; the first factor under the *Monk* analysis] would not require Hotchkiss to keep a watchful eye on Munn at all times [because] . . . [p]roviders . . . may reasonably rely [on the basis of a putative victim's age, for that victim to] act in accordance with their age, judgment and experience").

<sup>253</sup> *Monk v. Temple George Assoc., LLC*, 869 A.2d 179, 187 (Conn. 2005).

<sup>254</sup> *Mahon v. Heim*, 332 A.2d 69, 71–72 (Conn. 1973); see also, e.g., *Overlock v. Ruedemann*, 165 A.2d 335, 337–38 (Conn. 1960); *Karpeles v. Heine*, 124 N.E. 101, 102 (N.Y. 1919). Some jurisdictions have held that a minor who partakes in an activity that is usually engaged in by adults is

TBI plaintiffs of Ariana's age and circumstances will be found to have breached their own standard of care is arguably a closer case than whether YMCA Camp Mohawk, assuming the allegations to be true, breached its obligation of care to Ariana.

In the fact-intensive analysis of assigning fault, juries might be persuaded to consider that plaintiffs like Ariana, being young adults, are of an age where they can realize that ticks and other natural perils are inherent risks of being outdoors. The relatively small size of the parasites<sup>255</sup> might militate against finding contributory fault, but the availability of precautions (e.g., DEET-based insect repellent) will almost certainly influence how much fault is assigned to whom. Additionally, tick-bite cases are arguably more likely to settle earlier in litigation and for less money in jurisdictions that have modified comparative fault schemes (like Connecticut) than in jurisdictions that do not (like New York), since plaintiffs might fear for the possibility that recovery would be barred at trial.

To the extent that they will consider these sorts of facts in the context of a limited duty analysis, judges assessing contributory fault at this phase might incorporate several observations concerning fault into their assessment of public policy. In *Munn*, Hotchkiss's argument in support of a limited duty will likely be unavailing in those jurisdictions that have adopted a doctrine of limited duty similar to that propounded in the Restatement (Third) of Torts<sup>256</sup> because the facts are not "extraordinary" enough to merit a limited duty. Courts that tend to consider mixed questions of fact and law in the duty of care phase might be tempted, however, to assess the likelihood of contributory fault when deciding whether to impose a limited duty. This judicial behavior should be rejected as yet another instance of taking the authority to decide issues of fact away from the trier of fact. Since limited duty is used to dismiss a case, this sort of analysis could arguably have the effect of imposing contributory negligence on a plaintiff by foreclosing the possibility for relief based on the trial court's perception of fault. This consequence of incorporating facts into the duty analysis would be pernicious in all states that have enacted comparative fault schemes, and especially so in those states that

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bound by the adult standard of care for that activity, irrespective of his or her particular abilities. See *Mahon*, 332 A.2d at 72–73 (reserving the decision to adopt this standard to the state legislature).

<sup>255</sup> For a discussion regarding ticks generally, see Part I.

<sup>256</sup> For a discussion of this doctrine, see *supra* Part II.A. Notably, this doctrine is subject to a public policy analysis, under which it remains somewhat unclear which cases are "extraordinary." Amici's policy posture regarding the existence of a legal duty in *Munn* is somewhat more generalizable to a number of cases than Hotchkiss's. Indeed, amici seem to cast the net so wide that a policy argument for a limited duty in *Horowitz* could be argued for using amici's analysis of how the *Monk* factors apply in *Munn*, even though this case, having occurred in the tick-ridden Litchfield County woods and not in rural China in the absence of industry travel advisories, seems to be distinguishable.

offer plaintiffs pure comparative fault, where the plaintiff's fault is never a bar to the possibility of recovery.

## 2. *In Loco Parentis*

The complaint in *Horowitz* alleged that YMCA Camp Mohawk stood in an *in loco parentis* relationship to Ariana.<sup>257</sup> Additionally, in his formulation of legal duty in *Munn*, Judge Underhill cited a case that said that teachers have an *in loco parentis* duty to protect students.<sup>258</sup> These cases concern the “student-protective aspect” of this doctrine,<sup>259</sup> which prescribes a duty to act reasonably in protecting minors by protecting them in the manner that a minor's parents would have.<sup>260</sup>

Where this doctrine is implicated, defendants might argue that parents are actually inclined to encourage their children to take some outdoor risks.<sup>261</sup> To this end, defendants might claim that this sort of relationship favors limited duty through the normal expectations prong of *Monk*. In other words, defendants could argue that a limited duty is proper because a minor's parents would not have expected a level of care to be provided that would insulate the minor from more remote-yet-ubiquitous outdoor risks, such as contracting TBI. This argument seems absurd on its face, because reasonable parents could not be taken to themselves normally act in a manner that would put a minor at risk. To the extent that courts are willing to entertain such facts at this juncture, however, this argument could be persuasive if courts were to recognize that there are facts to suggest that the parties—in *Horowitz*, Ariana, her parents, and the defendant sleepaway camp—did not actually expect a certain level of care to be provided, the absence of which played a role in the victim's injury.

## 3. *Expansive Liability: The Restatement of Torts' Approaches to Special Relationships*

The doctrine of *in loco parentis* is understood today to apply chiefly to minors in educational environments.<sup>262</sup> Where there are special

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<sup>257</sup> *Horowitz Compl.*, *supra* note 12, ¶ 7.

<sup>258</sup> *Munn Trial*, 24 F. Supp. 3d 155, 170 (D. Conn. 2014).

<sup>259</sup> See, e.g., John E. Rumel, *Back to the Future: The In Loco Parentis Doctrine and Its Impact on Whether K-12 Schools and Teachers Owe a Fiduciary Duty to Students*, 46 IND. L. REV. 711, 716 (2013) (defining this formulation of duty as the “less forceful-principle” of the *in loco parentis* doctrine relative to the doctrine in Supreme Court jurisprudence giving schools disciplinary authority over students).

<sup>260</sup> See *id.* at 716–17.

<sup>261</sup> See YMCA Camp Mohawk Amici Brief, *supra* note 176, at 27 (arguing that *in loco parentis* caregivers recognize that outdoor exploration is “widely recognized” as important to children's wellbeing).

<sup>262</sup> See, e.g., Edward H. Whang, Note, *Necessary Roughness: Imposing a Heightened Duty of Care on Colleges for Injuries of Student-Athletes*, 2 SPORTS LAW. J. 25, 30 (1995) (discussing the



relationships, however, protective, affirmative duties of protection can extend to adults. The Restatement (Second) of Torts has recognized that a duty of care is owed to persons who are in another's custody and deprived of normal opportunities for self-protection.<sup>263</sup> Under some variations of this doctrine, the relationship cannot give rise to liability unless the custody itself deprives the victim of normal opportunities for self-protection.<sup>264</sup> Similarly, § 40 of the Restatement (Third) of Torts provides that an actor in a special relationship with another person owes that person a duty of reasonable care with regard to the risks that arise within the scope of that relationship.<sup>265</sup>

The doctrines of § 314A and § 40 provide clear grounds for legal liability in TBI cases other than those involving minors in educational environments. Moreover, these duties can provide another avenue for liability if limited duties are recognized with respect to other legal duties that a defendant might otherwise be subject to. The duties arising under these sections, however, can still be subject to the limited duty analysis.<sup>266</sup> To this end, the policy arguments raised by the YMCA Camp Mohawk amici and Hotchkiss itself—the arguments that motivated the Second Circuit to certify questions to the Connecticut Supreme Court—could be persuasive to limit the duties arising under these sections. Of course, to the extent that the arguments in *Munn* turned on Cara's relative maturity, they

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demise of a postsecondary *in loco parentis* doctrine in the wake of mid-twentieth century social and political changes).

<sup>263</sup> RESTATEMENT (SECOND) OF TORTS § 314A (AM. LAW INST. 1965); *cf. id.* § 320 (stating that a duty to protect against injuries by third persons is owed to a person in another's custody just in case that person is deprived of opportunities for "self-protection"). For a widely cited example of the operation of § 314A, see *Harper v. Herman*, 499 N.W.2d 472 (Minn. 1993). The Minnesota Supreme Court opined in this case—which involved an invitee who was paralyzed after jumping from a host's boat into shallow waters—that the § 314A duty to protect extended to cases where a plaintiff is vulnerable and dependent on a defendant for his or her welfare, including in circumstances where a putative victim has paid an alleged tortfeasor in some expectation of protection. *Id.* at 474 & n.2. The court ultimately declined to extend liability to the plaintiff, because he was not deprived of normal opportunities for self-protection (e.g., he could inquire as to the depth of the water before diving in). *Id.* at 474.

<sup>264</sup> Calista Menzhuber, Note, *Torts: In the Absence of Parents: Expanding Liability for Caretaker's Failure to Protect Minors from Third-Party Harm*—*Bjerke v. Johnson*, 35 WM. MITCHELL L. REV. 714, 746 (2009). Connecticut seems to have adopted this sort of rule. *See, e.g., Grenier v. Comm'r of Transp.*, 51 A.3d 367, 380 (Conn. 2012) (holding that a local fraternity chapter did not owe a duty to provide a fraternity member safe transportation because the local fraternity's relationship with the member did not deprive him of opportunities for self-protection (e.g., by securing safe transportation)).

<sup>265</sup> RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARMS § 40(a) (AM. LAW INST. 2012). As the reporters note, "Restatement Second of Torts § 314A imposed affirmative duties of reasonable care on actors with certain special relationships with others. This Section replaces § 314A." *Id.* § 40 cmt. a.

<sup>266</sup> *See id.* § 40 cmt. b (indicating that the affirmative duties arising under § 40 and its predecessor, RESTATEMENT (SECOND) OF TORTS § 314A, can be subject to limitation under RESTATEMENT (THIRD) OF TORTS § 7(b)).

will be less persuasive where young children are injured, and arguably more persuasive where older children or adults are harmed. Accordingly, such a defense might relate to the contributory negligence defense previously discussed.<sup>267</sup> In any event, it is clear that the duties under these sections are a more expansive source of legal duty than the *in loco parentis* doctrine and other legal duties premised on a plaintiff-victim's age.

Furthermore, defendants might defend against duty arising under a special relationship by questioning whether a plaintiff was actually deprived of normal opportunities for self-protection. Since the protection under § 314A is triggered when an individual is deprived of *normal* opportunities for self-protection, the domestic facts of *Horowitz* might resolve in favor of the organizational defendant, whereas the foreign circumstances of *Munn* might resolve in favor of the plaintiffs. On the other hand, it seems more likely that the teenage plaintiffs in both cases were not per se deprived of opportunities to protect themselves from TBI—whether in Connecticut or China—even though they were in the care of their educators. In those jurisdictions that have departed from § 314A in favor of § 40, however, the injuries at issue in these cases could generate liability simply because they arose in the care of the school and the camp.

#### 4. *Specific Harms Doctrine: Other Circumstances Where a Duty to Prevent TBI Might Exist*

As a general rule, adults who are not in special relationships with a defendant property owner are not owed affirmative duties to protect from, prevent exposure to, or warn of TBI.<sup>268</sup> But duty to prevent TBI situations can exist beyond custodial relationships, because there are circumstances in which the *ferae naturae* rule does not apply<sup>269</sup> and omissions generate liability because of the relationships between the parties. Since these situations might complicate a limited duty defense, the remainder of this Section discusses noncustodial circumstances where a duty to prevent TBI might exist.

Under contemporary law, colleges do not stand *in loco parentis* to students.<sup>270</sup> Aside from when they are in situations like student-athlete relationships, students are generally not in special relationships with their colleges, and there is thus not a general duty of care to all students in all

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<sup>267</sup> *Supra* Part IV.B.1.

<sup>268</sup> This is called the *ferae naturae* rule. For more discussion on this rule, see *supra* Introduction to Part IV and note 210.

<sup>269</sup> For a discussion of these exceptions, see *supra* note 210.

<sup>270</sup> *E.g.*, *Grenier v. Comm'r of Transp.*, 51 A.3d 367, 383–84 (Conn. 2012) (noting that “[c]ourts across the United States have determined that college students are adults capable of ensuring their own safety”). For a discussion regarding the modern *in loco parentis* doctrine, see *supra* Part IV.B.2.

aspects of college life.<sup>271</sup> Courts have held that institutions do not have special relationships with their students absent having custody over them.<sup>272</sup> Therefore, courts generally do not impose liability on colleges for omissions leading to student injuries; they have even held that a legal duty does not necessarily arise when an injury is generally foreseeable.<sup>273</sup> Recently, for example, the California Court of Appeal declined to find that instructors owe a duty to protect their students from foreseeable acts of violence by other students, even when under the instructor's direct supervision.<sup>274</sup> Similarly, the courts have also been unwilling to extend liability to colleges for the activities of students off campus, including at social events that are not related to college activities or subject to college control.<sup>275</sup>

Despite this general principle, controversies regarding a college's affirmative duties to adult students—such as whether non-clinical faculty and staff have a duty to report students who are known to be suicidal—have arisen and have been litigated.<sup>276</sup> This development suggests a

<sup>271</sup> *Id.*; see also James J. Szablewicz & Annette Gibbs, *Colleges' Increasing Exposure to Liability: The New In Loco Parentis*, 16 J.L. & EDUC. 453, 457 (1987) (noting that, "[w]hile [there] has not been a uniform development . . . several courts in several jurisdictions have held colleges responsible for injuries to students . . . in extreme and extraordinary circumstances").

<sup>272</sup> See Ann MacLean Massie, *Suicide on Campus: The Appropriate Legal Responsibility of College Personnel*, 91 MARQ. L. REV. 625, 670, 670 n.246 (2008) (citing RESTATEMENT (THIRD) OF TORTS § 40 (AM. LAW INST. 2005) for the proposition that colleges may be in special relationships with students in certain crisis situations (e.g., if the student is suicidal)).

<sup>273</sup> See, e.g., *Mortiboys v. St. Michael's Coll.*, 478 F.2d 196, 196 (2d Cir. 1973) (refusing to impose liability on a college because a school's duty was just "reasonable care under the circumstances" and college employees were not constructively aware of a hazard); *Baldwin v. Zoradi*, 123 Cal. App. 3d 275, 286–87 (1981) (declining to hold a college to a "duty to control alcoholic intake by students").

<sup>274</sup> *Regents of the Univ. of Cal. v. Super. Ct. of L.A. Cnty.*, 240 Cal. App. 4th 1296, 1328 (2015) (Perluss, P.J., dissenting), *petition for review granted sub nom. Regents of Univ. of Cal. v. S.C. (Rosen)*, 364 P.3d 174 (Cal. Jan. 20, 2016). In this case, the Court of Appeal concluded that a student who was injured in a knife attack perpetrated by another student known to suffer from symptoms of schizophrenia was not owed a duty by UCLA to prevent the attack because "a student's attendance at a university is not, standing alone, sufficient to create a special relationship giving rise to a duty to protect." *Id.* at 1312. Accordingly, in reversing the trial court to grant summary judgment for the defendant university, this court concluded that "a public university has no general duty to protect its students from the criminal acts of other students." *Id.* at 1301.

<sup>275</sup> E.g., *Rubtchinsky v. State Univ. at Albany*, 260 N.Y.S.2d 256, 259 (Ct. Cl. 1965) (holding that college "authorities [did not] violate[] any duty to . . . claimants" where students were injured in an activity off the college campus); see also Spring J. Walton, Note, *In Loco Parentis for the 1990's: New Liabilities*, 19 OHIO N. UNIV. L. REV. 247, 270 (1992) (articulating the doctrinal limitations for institutional liability where postsecondary students are injured on and off campus).

<sup>276</sup> E.g., *Schieszler v. Ferrum Coll.*, 236 F. Supp. 2d 602, 609 (W.D. Va. 2002) (holding that "the plaintiff [the administrator of the estate of a student who had committed suicide at college] alleged sufficient facts to support her claim that a special relationship existed between [the student] and [the college] giving rise to a duty to protect [the student] from the foreseeable danger that he would hurt himself [i.e., by committing suicide]"); *Gonzales v. Univ. Sys. of N.H.*, No. 451217, 2005 WL 530806, at \*11 (Conn. Super. Ct. Jan. 28, 2005) (citing New Hampshire case law for the proposition that

changing attitude towards the liability of colleges and institutions for injuries to adult “victims.” Moreover, scholars have noted that colleges now owe their students a duty of care to prevent specific harms that are *highly foreseeable* to the school, such as a vulnerable student’s suicide.<sup>277</sup> This has been called the “specific harms” doctrine.<sup>278</sup>

In *Horowitz*, Ariana’s TBI was almost certainly foreseeable to YMCA Camp Mohawk, because the camp was constructively, if not actually, aware of the risk of Lyme Disease.<sup>279</sup> Similarly, the specific harms doctrine suggests that colleges in tick-ridden parts of the country could owe a duty to prevent students’ exposure to TBI, assuming that they could clearly foresee the risk of transmission. This doctrine suggests that there are policy reasons to impose an additional affirmative duty to act where colleges, unlike caregivers for minors, do not normally have an obligation to act. A college student bitten by a tick on his or her college campus could argue that the college had a duty to warn him about the existence of the natural peril—if not to protect him from it altogether—on policy grounds similar to those used to argue for the extension of a duty of care to suicide tragedies in college.<sup>280</sup> Perhaps this is proper where the specific harm—TBI—is so foreseeable to the college that it could be said to be highly foreseeable. Absent special circumstances analogous to a given student’s particular risk of contracting TBI or a special inability to protect him or herself from it, however, jurisdictions might decline to impose such a duty on post-secondary institutions for adult students of ordinary intelligence.<sup>281</sup>

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colleges can have an affirmative duty to protect a suicidal student); *see also* Massie, *supra* note 272, at 679–80 (proposing a rule imposing an affirmative duty on college personnel to report suicidal students to appropriate authorities).

<sup>277</sup> Massie, *supra* note 272, at 642.

<sup>278</sup> *See id.*

<sup>279</sup> *See* Horowitz Compl., *supra* note 12, ¶¶ 9–11 (explaining that YMCA Camp Mohawk distributed information acknowledging the risk of Lyme Disease at its campus to Ariana and her parents, and alleging that YMCA Camp Mohawk breached its own standard of care by failing to comply with the precautions stated therein).

<sup>280</sup> This could involve an “[a]rgument from [m]orality.” Massie, *supra* note 272, at 665. These sorts of arguments have been used to argue that the default rule of “no-duty-to-rescue” should not apply. *Id.* at 665–68.

<sup>281</sup> For instance, courts have recognized that colleges might owe legal duties to students who have different relationships with the school than conventional students do, including student-athletes. Massie, *supra* note 272, at 641; Whang, *supra* note 262, at 43. The student-athlete relationship differs from the conventional student relationship because there is mutual dependence between the college and the athlete, and colleges have been known to exert a high level of control over the lives of student-athletes, limiting their personal and academic autonomy—by imposing grueling training schedules, for instance—in favor of the interests of the school’s athletics departments. Whang, *supra* note 262, at 44–45. Therefore, some have suggested that colleges should be held to a legal duty to protect their student-athletes from foreseeable injuries. For example, the Third Circuit has suggested that colleges should owe a duty to protect student-athletes from foreseeable injuries incurred in the active conduct of the sport for which the student-athlete has been recruited. *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1367 (3d Cir. 1993). Thus, unlike the conditions needed to trigger duty under RESTATEMENT (SECOND)

Even if a duty is recognized as to TBI, post-secondary institutions might succeed at avoiding liability on the basis of a contributory negligence defense. Moreover, a defendant institution would have strong chances of compelling a favorable (if not simply nuisance-value) settlement where a plaintiff is likely at fault him or herself. At the least, colleges should prepare for the possibility of litigation by maintaining their grounds to abate tick populations and advising students of this natural peril to anticipate avoiding a breach of duty in the event that a duty of care is imposed.

#### V. CONCLUSION: TOWARDS A RESOLUTION FOR BREACH AND DUTY

The law upholds a duty of great generality, resting upon and owed to all persons, not to do acts that are unreasonably negligent.<sup>282</sup> As a basic principle of civil jurisprudence that predates the Constitution, judges do not answer questions of fact where a jury is impaneled, and impaneled juries do not answer questions of law.<sup>283</sup> Limited duty rules can muddle this distinction by permitting judges to dismiss cases on theories that blend facts with law,<sup>284</sup> arguably depriving a plaintiff of the right to jury trial. At worst, the limited duty approach can be used to obscure the fact that a jury question is being decided by a trial court.<sup>285</sup>

This does not have to be so. A legal duty does not have to be “all or nothing,”<sup>286</sup> because they should account for the general relationship between the parties,<sup>287</sup> and the policy of imposing a duty given that general

OF TORTS § 314A, student-athletes do not have to be deprived of normal opportunities for self-protection to be owed a duty. Rather, their degree of affiliation with an educational institution itself merits imposing duty.

Another front for liability might exist where plaintiffs are notably less able to protect themselves than reasonable, ordinary adults are (e.g., persons who are mentally challenged).

<sup>282</sup> Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40, 52 (1915).

<sup>283</sup> Paul F. Kirgis, *The Right to a Jury Decision on Questions of Fact Under the Seventh Amendment*, 64 OHIO ST. L.J. 1125, 1126 (2003).

<sup>284</sup> See, e.g., Goldberg & Zipursky, *supra* note 214 (discussing Hotchkiss’s argument to the Second Circuit). Expressed another way, this could mean that society “risk[s] losing negligence law as a form of law.” See *id.* (bemoaning the possible ramifications of the Second Circuit’s decision to certify).

<sup>285</sup> See, e.g., Sugarman, *supra* note 239, at 12 (discussing the problems with the liberal use of the limited duty concept). For instance, scholars have criticized California’s tendency to find limited duties in disputes where the existence of some duty is settled. See *id.* at 8 (criticizing the limited duty finding and dismissal in *Verdugo v. Target*, 327 P.2d 774 (Cal. 2014)); see also Goldberg & Zipursky, *Missing the Mark on Duty, Again.*, NEW PRIVATE L. (Nov. 5, 2015), <http://blogs.harvard.edu/nplblog/2015/11/05/missing-the-mark-on-duty-again-regents-v-superior-court-goldberg-zipursky/> [<https://perma.cc/L97T-C8D8>] (characterizing the position that the University of California Los Angeles owed no duty of care to a student attacked by another student wielding a knife in *Regents of the Univ. of Cal. v. Super. Ct. of L.A. Cnty.*, 240 Cal. App. 4th 1296 (2015), as “untenable”).

<sup>286</sup> See *Regents of the Univ. of Cal.*, 240 Cal. App. 4th at 1333 (Perluss, P.J., dissenting).

<sup>287</sup> E.g., *Lodge v. Arett Sales Corp.*, 717 A.2d 215, 219 (Conn. 1998) (stating that “[t]he nature of the duty, and the specific persons to whom it is owed, are determined by the circumstances surrounding

relationship.<sup>288</sup> As a general matter, however, legal duty decisions should not assess the particular facts before a court. Although there is some scholarly disagreement about how to determine the circumstances in which such rules are appropriate,<sup>289</sup> the Restatement (Third) of Torts has recommended that foreseeability should not be considered in determining whether a limited duty should be fashioned.<sup>290</sup> Critically, this Restatement's guidance that finding limited duty is appropriate where an articulated principle or policy warrants doing so<sup>291</sup> remains unhelpfully vague guidance, because it is unclear which cases are extraordinary enough to merit a limited duty. Thus, there is a critical need for each jurisdiction to define precisely how limited duty rules are properly considered.

The interpretation of the Restatement (Third) of Torts' limited duty doctrine that Professor Sugarman has endorsed—that judges should ultimately decide when limited duty rules should be created, but that they should take care to avoid judging breach questions<sup>292</sup>—is a realistic, moderate position. Courts that follow this interpretation have shown an ability to be “candid and reflective about the relative roles of jury and judge” by reserving fact questions to the jury.<sup>293</sup> Such questions, including whether the defendant breached its standard of care or whether some act or omission was the proximate cause of a plaintiff's injury, are so properly reserved unless “as a matter of law . . . reasonable people could not disagree” about them,<sup>294</sup> meriting relief through summary judgment, directed verdict, or judgment notwithstanding the verdict.

Limited duty should not be used to deprive a plaintiff of an entitled right to jury process. Nor should it be used to expose a defendant to an

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the conduct of the individual”); *Strauss v. Bell Realty Co.*, 482 N.E.2d 34, 36 (N.Y. 1985) (noting that “it is still the responsibility of courts, in fixing the orbit of duty, ‘to limit the legal consequences of wrongs to a controllable degree’ and to protect against crushing exposure to liability” (quoting *Tobin v. Grossman*, 249 N.E.2d 419, 424 (N.Y. 1969))).

<sup>288</sup> Twerski, *supra* note 37, at 4.

<sup>289</sup> *Compare, e.g.*, Twerski, *supra* note 37, at 25 (arguing that limited duty rules on the basis of public policy are proper, even if they are of varying levels of specificity in different cases) *with* *Esper & Keating*, *supra* note 13, at 327 (advocating for reform of California's limited duty doctrine to emphasize creation of categorical, precedent-driven rules considering the abstract positions between parties).

<sup>290</sup> RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. j (AM. LAW INST. 2005).

<sup>291</sup> *Id.*

<sup>292</sup> *See* Sugarman, *supra* note 239, at 25 (recommending that judges should avoid determining breach questions, including “the appropriate precautions that reasonably prudent actors should take[,] . . . [and] the degree to which an actor's conduct (or failure to act) foreseeably risks harm to another”).

<sup>293</sup> *Id.* at 25–26.

<sup>294</sup> *A.W. v. Lancaster Cnty. Sch. Dist.* 0001, 784 N.W.2d 907, 918 (Neb. 2010). In this context, the Nebraska Supreme Court reversed and remanded a case in which the question of whether a reasonable person would have foreseen a student's sexual assault had been impermissibly evaluated as a component of the duty of care. *Id.* at 917.

unreasonable suit.<sup>295</sup> In the *Munn* and *Horowitz* cases, limited duty is almost certainly inappropriate because the level of inquiry into the nature of the plaintiff's injury that should occur at this juncture is an abstract one, and because the custodial context of the incidents and the policy surrounding care for minors are settled, at least when they are viewed at the level of generality based on the relationship between the plaintiff and defendant that is proper at the duty of care phase. Therefore, in these cases, much of the battle should occur at the breach phase, during which a jury can determine whether a plaintiff's injuries were reasonably foreseeable to a defendant, and whether a defendant's acts or omissions were the proximate cause of a plaintiff's injuries. To the extent that defenses are raised in *Horowitz*, they should turn on contributory negligence, and perhaps on the causation of Ariana's injuries.<sup>296</sup>

If or when the Connecticut Supreme Court answers the certified questions in *Munn*, it should not prescribe a limited duty. Rather, the court should conclude that much of Hotchkiss and its amici's claims concerned specific issues of fact that were properly reserved to the jury at trial. The court should recognize that the policy arguments offered by Hotchkiss and the amici are not exceptional enough to merit a limited duty,<sup>297</sup> and that, in the first place, Cara Munn's injuries were sufficiently foreseeable in their general nature to say that Hotchkiss, given its relationship to Cara, owed her a duty to guard against them.

Since limiting a defendant's duty of care can be a slippery slope that will encourage risky judicial conduct in disregard of the role of the fact-finder and appeals of cases that have been correctly tried to reasonably obtained jury verdicts, it should generally be avoided. Where courts do decide to adopt limited duty rules, however, those rules should be clear enough to guide future cases as precedent. The courts should adopt rules that protect negligence law as a form of coherent law, respect jury decisions, and encourage settlement of claims. Courts can accomplish these aims by assessing at the duty of care juncture just those facts needed to say whether (1) the general nature of a plaintiff's harm was foreseeable to a defendant, given the relationship between the parties; and (2) whether, if a plaintiff's harm was generally foreseeable to the defendant, there is a

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<sup>295</sup> The implication of exposure to an unreasonable suit (i.e., if the trial court recognizes a duty of care) is that the defendant will be more likely to spend money in an attempt to settle the case for nuisance value. From a policy perspective, an increase in frivolous litigation is a waste of judicial resources, an inequitable drain on defendants, and also a probable factor in increased insurance costs.

<sup>296</sup> Specifically, (1) whether Ariana was harmed at the camp, by a tick, and (2) even if Ariana was so harmed, whether Ariana's damages are attributable to TBI.

<sup>297</sup> In other words, these are situations where "it is legally *permissible* for someone to be negligent and nonetheless not be liable for the harm they cause." Sugarman, *supra* note 239, at 8. For a suggestion regarding a situation where public policy might favor not recognizing a duty, see the discussion of the *ferae naturae* doctrine in the Introduction to Part IV, *supra*.

principle or policy at this level of abstraction that would merit limiting liability. Those defendants who are denied relief through limited duty should not despair; other procedural safeguards, including summary judgment, directed verdict, and judgment notwithstanding a jury verdict, can be properly used to absolve liability in one-sided cases.

The tick-bite suit arguably has limited viability outside of the context of a custodial relationship involving a minor. This is perhaps the way that it should remain. The courts have shown great ability to fashion equitable and fair results, but decisions of law should be founded on reasoning supported by law in order to later govern future situations as law. Case-specific facts not needed to determine whether a duty exists should not be taken from a fact-finder unless reasonable people cannot differ about their disposition. By adopting the consistent and rare role for limited duty suggested by the Restatement (Third) of Torts and not accepting arguments that mix facts and law, jurisdictions will ensure that legal duty exists where the law indicates that it should. Tick-bite litigation might not go away, but, with the possibility of limited duties and other means of relief, it will not proliferate unreasonably.



