ORSON D. MUNN III ET AL. *v.* THE HOTCHKISS SCHOOL
(SC 19525)

Rogers, C. J., and Palmer, Eveleigh, McDonald and Espinosa, Js.

Syllabus

The plaintiff, a student at the defendant private boarding school, brought a negligence action in federal court to recover damages resulting from injuries that she sustained after she had contracted tick-borne encephalitis on an educational trip to China organized by the defendant. Prior to the trip, one of the defendant's employees, who served as the director of the defendant's international programs and who provided the students who were traveling to China with information about the trip, viewed on the website for the United States Center for Disease Control and Prevention information concerning travel to China. That information included a warning that tick-borne encephalitis occurred in the forested region of China where the students would be traveling and an instruction to travelers that the disease could be prevented by taking certain precautions to protect against insect bites. The plaintiff claimed that the defendant had been negligent by, inter alia, failing to warn students going on the trip and their parents of the risk of exposure to tick-borne encephalitis, and by failing to ensure that the students took protective measures against insect bites to prevent contracting that disease. During the trip, the students visited a certain mountain in an area of China where the website had reported that tick-borne encephalitis was present, and the defendant did not warn the students to take precautions to protect against insect bites. After the group of students ascended the mountain, the plaintiff and a small group of other students became lost in the woods when they were allowed to descend the mountain by themselves. The plaintiff received insect bites and, ten days later, began to experience the first symptoms of tick-borne encephalitis. She subsequently became partially paralyzed and semicomatose, but, thereafter, her condition stabilized and improved. As a result of her illness, the plaintiff cannot speak, has limited dexterity in her hands that prevents her from typing, and has limited control over her facial muscles causing her to drool, to have difficulty eating and swallowing, and to exhibit socially inappropriate facial expressions. Furthermore, although the plaintiff remains intelligent, she has compromised brain functioning that inhibits her ability to utilize that intelligence. The jury awarded the plaintiff $41.75 million in damages, of which $31.5 million constituted noneconomic damages, and the United States District Court for the District of Connecticut rendered judgment thereon for the plaintiff. The defendant appealed to the Second Circuit Court of Appeals, which concluded that there was sufficient evidence presented at trial for the jury to find that the plaintiff's

illness was foreseeable. The Second Circuit then certified questions to this court as to whether Connecticut public policy supported imposing a duty on a school to warn about or to protect against the foreseeable risk of a serious insect-borne disease when it organizes a trip abroad and whether the noneconomic portion of the damages award warranted a remittitur. *Held*:

1. The public policy of Connecticut does not preclude imposing a duty on a school to warn about or to protect against the risk of a serious insect-borne disease when organizing a trip abroad, as it is widely recognized that schools generally are obligated to exercise reasonable care to protect students in their charge from foreseeable harms, and there was no compelling reason to create an exception in this case for foreseeable serious insect-borne diseases: the normal expectations of the participants in a school sponsored educational trip abroad involving minor children supported the imposition of a duty on the defendant to warn about and to protect against serious insect-borne diseases in the areas to be visited on the trip, as trip participants naturally would expect that a school will give appropriate warnings and use ordinary care with respect to serious insect-borne diseases in the particular areas to be visited; furthermore, the recognition that a school's general duty to protect its students includes the responsibility to take reasonable measures to warn about and to protect against serious insect-borne diseases will not have a chilling effect on educational travel but will promote safety by ensuring that unnecessary risks are eliminated or reduced by appropriate warnings and protective measures; moreover, this court was skeptical that the recognition of this duty would lead to a substantial increase in litigation, as such a duty afforded students only the opportunity to prove negligence and did not create a new cause of action, but was one specific aspect of the already well established general duty of schools to take reasonable measures to ensure the safety of minors over whom they have assumed custody; in addition, contrary to the defendant's claim that there should be no duty to warn or to protect in the circumstances of this case because the probability of the plaintiff contracting tick-borne encephalitis was remote, the rarity of tick-borne encephalitis was not relevant to this court's public policy analysis and should be weighed by the fact finder when determining foreseeability.
2. The jury award to the plaintiff fell within the necessarily uncertain limits of just damages and did not warrant a remittitur: there was no allegation that the jury was prejudiced, incompetent or otherwise compromised, the District Court concluded that the jury was not motivated by undue sympathy, and only in the most rarest of circumstances should the size of the verdict alone warrant a remittitur; furthermore, the District Court, which was in a position to evaluate the testimony firsthand, did not improperly assess of the plaintiff's injuries as uniquely cruel, as she had completely lost the ability to have meaningful communication and interaction with people, and, given her long life expectancy and the fact

that the physical effects of her injuries will worsen as she ages, her psychological condition will deteriorate over time; moreover, it would serve no useful purpose for this court to compare this verdict and this plaintiff's injuries to the verdicts and injuries in other cases, as the question of damages is one peculiarly within the province of the fact finder, and, in the absence of evident mistakes or partiality, this court deferred to the jury's judgment.

(*Two justices concurring separately in two opinions*)

Argued March 27—officially released August 11, 2017*

Procedural History

Action to recover damages for personal injuries sustained by the plaintiff Cara L. Munn as a result of the defendant's alleged negligence, and for other relief, brought to the United States District Court for the District of Connecticut and tried to the jury before *Underhill*, *J.*; verdict and judgment for the plaintiffs; thereafter, the court, *Underhill*, *J.*, denied the defendant's motion for judgment as a matter of law, motion for a new trial and motion to alter the judgment, and, pursuant to the parties' stipulation on collateral source reduction, rendered an amended judgment for the plaintiffs, from which the defendant appealed to the United States Court of Appeals for the Second Circuit, *Walker*, *Lynch* and *Lohier*, *Js.*, which certified certain questions of law to this court.

Antonio Ponvert III, with whom was *Alinor C. Sterling*, for the appellant (defendant).

Wesley W. Horton, with whom were *Karen L. Dowd*, *Jeffrey R. Babbin* and, on the brief, *Kenneth J. Bartschi* and *Aaron S. Bayer*, for the appellees (plaintiffs).

Renee W. Dwyer and *Brian M. Paice* filed a brief for American Camp Association, Inc., et al. as amici curiae.

Frank J. Silvestri, *Jr.*, filed a brief for National Association of Independent Schools et al. as amici curiae.

* August 11, 2017, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

ROGERS, C. J. The issues in this case, which comes to us on certification from the United States Court of Appeals for the Second Circuit pursuant to General Statutes § 51-199b (d),[1] are: (1) Does Connecticut public policy support imposing a duty on a school to warn about or protect against the risk of a serious insect-borne disease when it organizes a trip abroad? (2) If so, does a damages award of approximately $41.5 million, $31.5 million of which are noneconomic damages, warrant a remittitur? We answer the first question in the affirmative and the second question in the negative.

The following facts, which find support in the record certified by the Second Circuit, and procedural history are relevant to our resolution of the certified issues.[2] The defendant, The Hotchkiss School, is a private boarding school located in Lakeville. At the time of the events underlying this appeal, the plaintiff, Cara L. Munn,[3] was a student there. In June and July of 2007, the plaintiff, who recently had turned fifteen years old and completed her freshman year, joined other students and faculty of the school on an educational trip to China. In July, she contracted tick-borne encephalitis, a viral infectious disease that attacks the central nervous system, as a result of being bitten by an infected tick during a hike on Mount Panshan, which is located in a forested

[1] General Statutes § 51-199b (d) provides: "The Supreme Court may answer a question of law certified to it by a court of the United States or by the highest court of another state or of a tribe, if the answer may be determinative of an issue in pending litigation in the certifying court and if there is no controlling appellate decision, constitutional provision or statute of this state."

[2] For a more complete discussion of the underlying facts, see *Munn* v. *Hotchkiss School*, 24 F. Supp. 3d 155 (D. Conn. 2014).

[3] Cara L. Munn's parents, Orson D. Munn III and Christine Munn, also were named as plaintiffs in this matter due to their incurrence of substantial expenses, on her behalf, which they sought to recoup. For simplicity, we refer hereinafter to Cara L. Munn alone as the plaintiff.

area approximately sixty miles from Tianjin, a city in northeastern China. As a result of contracting tick-borne encephalitis, the plaintiff suffered permanent brain damage that has impacted severely the course of her life.

In 2009, the plaintiff filed a diversity action in the United States District Court for the District of Connecticut, alleging that the defendant had been negligent by, inter alia, failing to warn students and their parents of the risk of exposure to insect-borne diseases and failing to ensure that the students took protective measures against insect bites prior to visiting Mount Panshan. The case was tried to a jury in March, 2013. The jury returned a verdict in the plaintiff's favor, and it awarded her $10.25 million in economic damages and $31.5 million in noneconomic damages. The award was then reduced pursuant to a stipulated collateral source reduction.

The defendant thereafter challenged the verdict, moving for judgment as a matter of law; see Fed. R. Civ. P. 50 (b); or, alternatively, for a new trial. See Fed. R. Civ. P. 59. The District Court rejected each of the claims the defendant made in support of those motions, including that the plaintiff's infection with tick-borne encephalitis was unforeseeable, that public policy precluded the imposition of a legal duty on the defendant and that the noneconomic portion of the damages award was excessive as a matter of law. The defendant appealed from the District Court's judgment to the Second Circuit Court of Appeals, challenging its determinations on each of those claims. The Second Circuit agreed with the plaintiff that there was sufficient evidence presented at trial for the jury to find that her illness was foreseeable; *Munn* v. *Hotchkiss School*, 795 F.3d 324, 330 (2d Cir. 2015); but, finding insufficient guidance in existing Connecticut law, certified to this court the issues of whether Connecticut public policy supports

the imposition of a duty on a school to warn about or to protect against the foreseeable risk of a serious insect-borne disease when organizing a trip abroad and, if so, whether the jury's damages award, particularly the noneconomic portion, warranted a remittitur. Id., 337.

I

We first consider whether Connecticut public policy supports the imposition of a duty on a school to warn about or protect against the foreseeable risk of a serious insect-borne disease when it organizes a trip abroad. Because it is widely recognized that schools generally are obligated to exercise reasonable care to protect students in their charge from foreseeable dangers, and there is no compelling reason to create an exception for foreseeable serious insect-borne diseases, we conclude that the imposition of such a duty is not contrary to Connecticut public policy and, accordingly, answer the first certified question in the affirmative.

The following additional facts that the jury reasonably could have found in support of its verdict are relevant. In the spring of 2007, Jean Yu, the director of the defendant's Chinese language and culture program and the leader of the trip, and David Thompson, the director of the defendant's international programs, provided the students who would be traveling to China with information about the trip. A list of places that the students would be visiting included "Mount Pan"[4] as part of a Tianjin city tour. A subsequently distributed itinerary again listed "Mount Pan" as part of a city tour. The itinerary did not describe "Mount Pan" or indicate that the students would be visiting a forested area during the trip, which otherwise took place in urban or suburban settings.

[4] Throughout the record, Mount Panshan is referred to variously as "Mount Pan," "Mt. Pan" and "Panshan mountain."

The students and parents also received some written medical advice for the trip in an e-mail including a hyperlink to a United States Centers for Disease Control and Prevention (CDC) website that erroneously directed users to the page addressing Central America, rather than the one addressing China. The same document, as well as a generic predeparture manual produced by Thompson's office, indicated that the defendant's infirmary could serve as a travel clinic, although the infirmary was not qualified to provide travel related medical advice. Finally, a packing list provided to the students going on the China trip included "[b]ug spray or lotion (or bug spray wipes)," but that item was listed only under the heading "Miscellaneous Items," along with other, seemingly optional things like "[t]ravel umbrella" and "[m]usical instrument." None of the foregoing documents provided any warning about insect-borne illnesses, although other health and medical issues, such as immunizations, prescriptions and sexually transmitted diseases, were discussed.

Prior to the trip, Thompson viewed the page on the CDC website directed at travelers to China. In its discussion of diseases found in the area, the page stated that "[tick borne] encephalitis occurs in forested regions in northeastern China and in South Korea. Protecting yourself against insect bites (see below) will help to prevent these diseases." A section that followed, captioned "Prevent Insect Bites," instructed travelers to use insect repellent containing the chemical compound DEET and to wear long sleeves and long pants when outdoors. At trial, Thompson admitted seeing this information at the time of the trip, and, although he initially contended to the contrary, he subsequently agreed that Tianjin is in northeastern China. Other travel information sources generally available at the time also reported that tick-borne encephalitis was present in

northeastern China. See footnote 7 of this opinion. No one on behalf of the defendant, including Thompson, warned students or their parents about the presence of tick-borne encephalitis in forested regions of northeastern China or the need to protect against it.[5]

The students visited Mount Panshan about two weeks into the trip as part of a weekend excursion outside of Tianjin's city center. Evidence submitted at trial demonstrated that Mount Panshan is a forested peak adjacent to other smaller foothills, surrounded by an exurban landscape.[6] No one warned the students to wear clothing that would protect them against insect bites or to apply insect repellent before the trek up the mountain. The group ascended Mount Panshan together on a paved pathway, dressed in shorts and T-shirts or tank tops, but split up for the descent. Most students, teachers and chaperones rode a cable car down the mountain. The plaintiff and two or three other students, however,

[5] A printout of the page addressing China on the CDC website, quoted previously, was introduced as a defense exhibit at trial. On appeal to the Second Circuit, the defendant argued that the jury could not rely on it as evidence of foreseeability because it is dated August 1, 2007, i.e., just after the school trip. That court rejected the defendant's attempt to discredit its own exhibit in favor of another CDC advisory dated May 23, 2007, which did not mention tick-borne encephalitis, because the May advisory was not part of the trial record. Additionally, the court reasoned that, "while the August 1, 2007 advisory postdates the trip, it is possible that a similar advisory was on the website before, which would explain Thompson's testimony about seeing the advisory. Neither party presented evidence about what was posted on the CDC website when the trip actually occurred, and we will not disturb the jury's assessment of the evidence and its finding of reasonable foreseeability."

Before this court, the defendant again suggests that its own trial exhibit, as well as Thompson's testimony that he had seen the contents of that exhibit prior to the trip, is not reliable evidence. Because a determination of the competence of the evidence in this case is well beyond the scope of the certified questions, we must accept the conclusion of the Second Circuit that the jury properly relied upon that evidence.

[6] As the District Court explained, an exurban landscape is "a traditionally rural community with growing housing density created by commuters to the cities."

were permitted to walk down the mountain by themselves. On the way down, the plaintiff and her cohorts left the paved pathway and became lost, walking on narrow dirt trails, among trees and through brush before eventually rejoining the rest of the group. Along the way, the plaintiff received many insect bites and soon developed an itchy welt. Ten days later, she began to experience the first symptoms of tick-borne encephalitis.

We turn to the first certified question, which concerns the defendant's duty to the plaintiff. "Duty is a legal conclusion about relationships between individuals, made after the fact, and imperative to a negligence cause of action. The nature of the duty, and the specific persons to whom it is owed, are determined by the circumstances surrounding the conduct of the individual. . . . Although it has been said that no universal test for [duty] ever has been formulated . . . our threshold inquiry has always been whether the specific harm alleged by the plaintiff was foreseeable to the defendant. The ultimate test of the existence of the duty to use care is found in the foreseeability that harm may result if it is not exercised. . . . By that [it] is not meant that one charged with negligence must be found actually to have foreseen the probability of harm or that the particular injury [that] resulted was foreseeable . . . . [T]he test for the existence of a legal duty entails (1) a determination of whether an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result, and (2) a determination, on the basis of a public policy analysis, of whether the defendant's responsibility for its negligent conduct should extend to the particular consequences or particular plaintiff in the case." (Inter-

nal quotation marks omitted.) *Ruiz* v. *Victory Properties, LLC*, 315 Conn. 320, 328–29, 107 A.3d 381 (2015).[7]

The second prong of the analysis is necessary because "[a] simple conclusion that the harm to the plaintiff was foreseeable . . . cannot by itself mandate a determination that a legal duty exists. Many harms are quite literally foreseeable, yet for pragmatic reasons, no recovery is allowed. . . . A further inquiry must be made, for we recognize that duty is not sacrosanct in itself . . . but is only an expression of the sum total of those considerations of policy [that] lead the law to say that the plaintiff is entitled to protection. . . . The final step in the duty inquiry, then, is to make a determi-

[7] We pause to emphasize that we are called upon to undertake the second determination only. The jury in this case determined, on the evidence presented at trial, that the plaintiff's infection with tick-borne encephalitis, or harm of that general nature, was foreseeable, and both the District Court and the Second Circuit have upheld that finding. See *Vendrella* v. *Astriab Family Ltd. Partnership*, 311 Conn. 301, 331–32, 87 A.3d 546 (2014) (unless fair and reasonable minds could reach only one conclusion, foreseeability is question of fact for jury). Specifically, in addition to the page addressing China on the CDC website that discussed tick-borne encephalitis in forested areas in northeastern China, which Thompson acknowledged seeing in advance of the trip, there also were in evidence: a CDC page directed at east Asia generally, dated April 23, 2007, which warned of the risk of several other insect-borne diseases; a British health advisory that warned of tick-borne encephalitis "in forested regions of China and Japan"; and expert testimony, as summarized by the District Court, that, "according to travel medicine reports routinely consulted by doctors and commercial trip planners in 2007, rural China was an endemic region for [tick-borne encephalitis], Japanese encephalitis, and Lyme disease."

Throughout its brief, the defendant emphasizes the remoteness of the risk of contracting tick-borne encephalitis. Although that factor is relevant to the duty analysis, it mainly informs the issue of foreseeability. We agree with the District Court that the public policy aspect of the duty analysis does not afford the defendant a new opportunity to relitigate the issue of foreseeability. See 1 Restatement (Third), Torts, Liability for Physical and Emotional Harm § 7, comment (j), pp. 82–83 (2010) (disapproving of use of foreseeability in judicial determinations of whether, for policy reasons, no duty should exist); see also *A.W.* v. *Lancaster County School District 0001*, 280 Neb. 205, 212–16, 784 N.W.2d 907 (2010) (explaining why courts should not consider factual issue of foreseeability when making determinations of legal duty).

nation of the fundamental policy of the law, as to whether the defendant's responsibility should extend to such results. . . . [I]n considering whether public policy suggests the imposition of a duty, we . . . consider the following four factors: (1) the normal expectations of the participants in the activity under review; (2) the public policy of encouraging participation in the activity, while weighing the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions. . . . [This] totality of the circumstances rule . . . is most consistent with the public policy goals of our legal system, as well as the general tenor of our [tort] jurisprudence." (Citations omitted; internal quotation marks omitted.) Id., 336–37.

Before turning to the public policy analysis, we pause to examine the broader legal framework that encompasses the specific certified issue. Although the law of negligence typically does not impose a duty on one party to act affirmatively in furtherance of the protection of another, there are certain exceptions to that general proposition. See generally 2 Restatement (Third), Torts, Liability for Physical and Emotional Harm §§ 37 through 44 (2012). One exception applies when there is a "special relationship" between those parties; id., § 40, pp. 39–40; and one example of such a special relationship that has received wide recognition, along with a concomitant duty to protect, is the relationship between schools and their students. See id., § 40 (b) (5), p. 40; see also, e.g, *Todd M.* v. *Richard L.*, 44 Conn. Supp. 527, 543, 696 A.2d 1063 (1995); *Boisson* v. *Arizona Board of Regents*, 236 Ariz. 619, 622–23, 343 P.3d 931 (App. 2015), review denied, Arizona Supreme Court, Docket No. CV-15-0121 (December 1, 2015); *Dailey* v. *Los Angeles Unified School District*, 2 Cal. 3d 741, 747, 470 P.2d 360, 87 Cal. Rptr. 376 (1970); *Hecksher* v. *Fairwinds Baptist Church, Inc.*, 115 A.3d 1187, 1206 (Del. 2015); *District of Columbia* v. *Royal*, 465 A.2d 367, 369 (D.C. 1983);

Rupp v. *Bryant*, 417 So. 2d 658, 666 (Fla. 1982); *Doe Parents No. 1* v. *State Dept. of Education*, 100 Haw. 34, 74, 58 P.3d 545 (2002); *Bellman* v. *Cedar Falls*, 617 N.W.2d 11, 21 (Iowa 2000); *Beshears* v. *Unified School District No. 305*, 261 Kan. 555, 563, 930 P.2d 1376 (1997); *Williams* v. *Kentucky Dept. of Education*, 113 S.W.3d 145, 148 (Ky. 2003); *Prier* v. *Horace Mann Ins. Co.*, 351 So. 2d 265, 268 (La. App.), cert. denied, 352 So. 2d 1042, 1045 (La. 1977); *Eisel* v. *Board of Education*, 324 Md. 376, 384, 597 A.2d 447 (1991); *Brown* v. *Knight*, 362 Mass. 350, 352, 285 N.E.2d 790 (1972); *Henderson* v. *Simpson County Public School District*, 847 So. 2d 856, 857 (Miss. 2003); *Graham* v. *Montana State University*, 235 Mont. 284, 289, 767 P.2d 301 (1988); *A.W.* v. *Lancaster County School District 0001*, 280 Neb. 205, 216, 784 N.W.2d 907 (2010); *Marquay* v. *Eno*, 139 N.H. 708, 717, 662 A.2d 272 (1995); *Mirand* v. *New York*, 84 N.Y.2d 44, 49, 637 N.E.2d 263, 614 N.Y.S.2d 372 (1994); *Fazzolari* v. *Portland School District No. 1J*, 303 Or. 1, 19, 734 P.2d 1326 (1987); *Christensen* v. *Royal School District No. 160*, 156 Wn. 2d 62, 70, 124 P.3d 283 (2005); cf. General Statutes § 10-220 (a) (4) ("[e]ach local or regional board of education . . . shall provide an appropriate learning environment for all its students which includes . . . a safe school setting").

As to the rationale for imposing an affirmative duty to protect in this context, "[t]he relationship between a school and its students parallels aspects of several other special relationships—it is a custodian of students, it is a land possessor who opens [its] premises to a significant public population, and it acts partially in the place of parents." (Internal quotation marks omitted.) *Monroe* v. *Basis School, Inc.*, 234 Ariz. 155, 157, 318 P.3d 871 (App. 2014). As a general matter, "[o]ne . . . who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under [a duty

to protect the other against unreasonable risk of physical harm].” 2 Restatement (Second), Torts § 314A (4), p. 118 (1965). At heart, “the duty [to protect] derives from the simple fact that a school, in assuming physical custody and control over its students, effectively takes the place of parents and guardians . . . .” *Mirand* v. *New York*, supra, 84 N.Y.2d 49; see also 2 Restatement (Second), supra, § 320, comment (b), p. 131 (“[A] child while in school is deprived of the protection of his parents or guardian. Therefore, the actor who takes custody . . . of a child is properly required to give him the protection which the custody or the manner in which it is taken has deprived him.”).[8]

“[T]he scope of the duty imposed by the student-school relationship is not limitless. . . . [T]he duty is tied to expected activities within the relationship. Therefore, in the student-school relationship, the duty of care is bounded by geography and time, encompassing risks such as those that occur while the student is at school or otherwise under the school’s control.” (Citation omitted; internal quotation marks omitted.) *Boisson* v. *Arizona Board of Regents*, supra, 236 Ariz. 623; see also *Strycharz* v. *Cady*, 323 Conn. 548, 579, 148 A.3d 1011 (2016) (rejecting, in public school immunity context, per se rule that would exempt school officials from liability for harm sustained during off campus school activities, such as educational field trips, and

[8] This court has recognized that children outside of their parents’ supervision require special protection. See, e.g., *Purzycki* v. *Fairfield*, 244 Conn. 101, 106, 708 A.2d 937 (1998) (school officials are not immune from liability to child injured in unsupervised hallway), overruled in part by *Haynes* v. *Middletown*, 314 Conn. 303, 316, 101 A.3d 249 (2014). In determining duty, we also have recognized the limited capacity of children to fully appreciate risks. See *Ruiz* v. *Victory Properties, LLC*, supra, 315 Conn. 333 (“[a]s to the care required of others in relation to children, the . . . propensity of children [to disregard dangerous conditions] has been taken into consideration in evaluating the negligence of these others” [internal quotation marks omitted]).

noting that "[p]arents who have relinquished control and custody of their children to the school rightly expect that the school will exercise reasonable care, as long as their children remain under the school's custody and control"); *Concepcion* v. *Archdiocese of Miami*, 693 So. 2d 1103, 1104 (Fla. App. 1997) ("a duty of supervision has been found for student injuries occurring [on school] premises as well as [off school] premises for school-related activities"). Outside of on campus occurrences during the regular school day, courts have found the duty applicable in such settings as school bus rides; see *Todd M.* v. *Richard L.*, supra, 44 Conn. Supp. 527, 543; *Doe* v. *DeSoto Parish School Board*, 907 So. 2d 275, 283 (La. App. 2005), cert. denied, 924 So. 2d 167 (La. 2006); athletic events; see *Limones* v. *School District*, 161 So. 3d 384, 391 (Fla. 2015); *Wagenblast* v. *Odessa School District No. 105-157-166J*, 110 Wn. 2d 845, 856, 758 P.2d 968 (1988); field trips; see *Bellman* v. *Cedar Falls*, supra, 617 N.W.2d 15, 17; off campus picnics; see *Brown* v. *Knight*, supra, 362 Mass. 350, 352; and off campus "[w]orkday" activities; *Travis* v. *Bohannon*, 128 Wn. App. 231, 234–35, 238–39, 115 P.3d 342 (2005); but not applicable to off campus occurrences that are unconnected with any school programming. See, e.g., *Boisson* v. *Arizona Board of Regents*, supra, 621, 624–25 (no duty to supervise college students' independently organized excursion to Mount Everest during study abroad trip to China); *Concepcion* v. *Archdiocese of Miami*, supra, 1105 (no duty to prevent after school fight that occurred on public sidewalk outside of school gates); *Anderson* v. *Shaughnessy*, 526 N.W.2d 625, 626 (Minn. 1995) (no duty to prevent harm once student disembarked school bus safely at scheduled destination).

The potential harms to be protected against vary widely. They have included physical and sexual assaults by strangers, other students or school employees; see

Dailey v. *Los Angeles Unified School District*, supra, 2 Cal. 3d 745–46; *Rupp* v. *Bryant*, supra, 417 So. 2d 660; *Doe Parents No. 1* v. *State Dept. of Education*, supra, 100 Haw. 42; *Doe* v. *DeSoto Parish School Board*, supra, 907 So. 2d 277; *A.W.* v. *Lancaster County School District 0001*, supra, 280 Neb. 206; *Marquay* v. *Eno*, supra, 139 N.H. 711; *Mirand* v. *New York*, supra, 84 N.Y.2d 47; *Fazzolari* v. *Portland School District No. 1J*, supra, 303 Or. 3; student suicide; *Eisel* v. *Board of Education*, supra, 324 Md. 377; accidents caused by students' drunk driving; *Williams* v. *Kentucky Dept. of Education*, supra, 113 S.W.3d 147; physical hazards; see *District of Columbia* v. *Royal*, supra, 465 A.2d 368 (partially disassembled fence); *Bellman* v. *Cedar Falls*, supra, 617 N.W.2d 15 (inadequately supervised golf cart); *Prier* v. *Horace Mann Ins. Co.*, supra, 351 So. 2d 267 (trash burner); *Brown* v. *Knight*, supra, 362 Mass. 350 (open fireplace); *Travis* v. *Bohannon*, supra, 128 Wn. App. 235–36 (hydraulic wood splitter); and aggravation of injuries suffered in a spontaneous medical emergency during a soccer game.[9] *Limones* v. *School District*, supra, 161 So. 3d 387.

Regarding the scope of the duty, standard negligence principles apply, within the context of the facts and circumstances of the particular case. "While [a] school is not an insurer of the safety of its students, it is obligated to exercise such care over students in its charge that a parent of ordinary prudence would exercise under comparable circumstances . . . ." (Citation omitted; internal quotation marks omitted.) *David* v. *New York*, 40 App. Div. 3d 572, 573, 835 N.Y.S.2d 377 (2007). The duty a school owes "to students and their parents is, on a general level, a duty to take whatever precautions are necessary reasonably to ensure the

[9] We cite these examples merely to demonstrate the range of circumstances in which the duty may apply, and not to suggest that we necessarily would extend the duty to all of the circumstances enumerated.

safety and welfare of the children entrusted to its custody and control against harm that the [school] anticipates, or reasonably should anticipate." *Doe Parents No. 1* v. *State Dept. of Education*, supra, 100 Haw. 80. What the duty quintessentially entails is "to exercise reasonable care in ensuring that students are educated in a safe environment free from any unreasonable risks of harm." Id., 81; see also *Henderson* v. *Simpson County Public School District*, supra, 847 So. 2d 857 ("schools have the responsibility to use ordinary care and to take reasonable steps to minimize foreseeable risks to students"). The degree of care required will vary depending on the particular risk at issue, the ages of the students in the school's custody and all of the attendant circumstances. *Dailey* v. *Los Angeles Unified School District*, supra, 2 Cal. 3d 748; *Doe* v. *DeSoto Parish School Board*, supra, 907 So. 2d 281; *Prier* v. *Horace Mann. Ins. Co.*, supra, 351 So. 2d 268; see also *Haynes* v. *Middletown*, 314 Conn. 303, 314–15, 101 A.3d 249 (2014) (recognizing that school's duty to protect extends to high school students).[10]

In light of the foregoing authorities, it is beyond dispute that, as a general matter, a school having custody of minor children has an obligation to use reasonable care to protect those children from foreseeable harms during school sponsored activities, including educational trips abroad. The question we must consider, then, is whether there is something unique and/or compelling about foreseeable insect-borne diseases that should excuse schools that are organizing educational trips abroad from exercising reasonable care to minimize the possibility that the minors entrusted to their

[10] One court has observed that, although high school students may require less rigorous and intrusive methods of supervision than younger children, "adolescent high school students are not adults and should not be expected to exhibit that degree of discretion, judgment, and concern for the safety of themselves and others which we associate with full maturity." *Dailey* v. *Los Angeles Unified School District*, supra, 2 Cal. 3d 748.

custody will contract such diseases. Stated otherwise, does Connecticut public policy mandate that, when it comes to foreseeable insect-borne diseases, there should be an exception to the general rule that schools must refrain from negligently exposing minor students, whom they have agreed to supervise in the absence of their parents, to foreseeable dangers? To answer that question, we begin by considering the first public policy factor, the normal expectations of the participants in an educational trip abroad.

As this case amply demonstrates, insect-borne diseases can pose significant threats to human health. When insect-borne diseases present serious risks, they become the subject of government warnings[11] and

[11] See, e.g., Centers for Disease Control and Prevention, "African Tick-Bite Fever," available at https://wwwnc.cdc.gov/travel/diseases/african-tick-bite-fever (last visited August 7, 2017) (warning travelers to sub-Saharan Africa and West Indies of African tick-bite fever), "African Trypanosomiasis (African Sleeping Sickness)," available at https://wwwnc.cdc.gov/travel/diseases/african-sleeping-sickness-african-trypansosomiasis (last visited August 7, 2017) (warning travelers to sub-Saharan Africa of African trypanosomiasis spread by tsetse flies), "Chagas Disease (American Trypanosomiasis)," available at https://wwwnc.cdc.gov/travel/diseases/chagas-disease-american-trypanosomiasis (last visited August 7, 2017) (warning travelers to Mexico, Central America and South America of Chagas disease spread by triatomine bugs), "Chikungunya," available at https://wwwnc.cdc.gov/travel/diseases/chikungunya (last visited August 7, 2017) (warning travelers to Africa, Asia, parts of Central and South America, and islands in Indian Ocean, western and South Pacific, and Caribbean of chikungunya spread by mosquitoes), "Dengue," available at https://wwwnc.cdc.gov/travel/diseases/dengue (last visited August 7, 2017) (warning travelers to tropical and subtropical regions of dengue spread by mosquitoes); "Japanese Encephalitis," available at https://wwwnc.cdc.gov/travel/diseases/japanese-encephalitis (last visited August 7, 2017) (warning travelers to certain areas of Asia of Japanese encephalitis spread by mosquitoes), "Malaria," available at https://wwwnc.cdc.gov/travel/diseases/malaria (last visited August 7, 2017) (warning travelers to Africa, Central and South America, parts of Caribbean, Asia, eastern Europe and south Pacific of malaria spread by mosquitoes), "Murray Valley Encephalitis Virus," available at https://wwwnc.cdc.gov/travel/diseases/murray-valley-encephalitis-virus (last visited August 7, 2017) (warning travelers to New Guinea and certain areas of Australia of Murray Valley encephalitis spread by mosquitoes), "Plague," available at https://wwwnc.cdc.gov/travel/diseases/plague-bubonic-pneumonic-septicemic

media attention.[12] The reason for the provision of such information is clear: people are interested in having it. When a particular disease is brought to an individual's attention, he or she can learn about the disease's prevalence, the areas in which the disease is endemic, whether there is a vaccine available and, if not, what other measures may be effective to prevent it. Furthermore, he or she can become aware of the symptoms of the disease, the damage to one's health that the

(last visited August 7, 2017) (warning travelers to Africa, central Asia, Indian subcontinent, northern South America and parts of southwestern United States of three types plague spread by fleas), "Rift Valley Fever," available at https://wwwnc.cdc.gov/travel/diseases/rift-river-valley (last visited August 7, 2017) (warning travelers to Africa of Rift Valley fever spread by mosquitoes), "Ross River Virus Disease," available at https://wwwnc.cdc.gov/travel/diseases/ross-river-virus-disease (last visited August 7, 2017) (warning travelers to Australia and Papua New Guinea of Ross River virus disease spread by mosquitoes), "Tick-borne Encephalitis," available at https://wwwnc.cdc.gov/travel/diseases/tickborne-encephalitis (last visited August 7, 2017) (warning travelers to Europe and Asia of tick-borne encephalitis), "West Nile Virus," available at https://wwwnc.cdc.gov/travel/diseases/west-nile-virus (last visited August 7, 2017) (warning travelers to Africa, Europe, Middle East, portions of Asia, and North America of West Nile virus spread by mosquitoes), "Yellow Fever," available at https://wwwnc.cdc.gov/travel/diseases/yellow-fever (last visited August 7, 2017) (warning travelers to certain parts of South America and Africa of yellow fever spread by mosquitoes), and "Zika," available at https://wwwnc.cdc.gov/travel/diseases/zika (last visited August 7, 2017) (generally warning of Zika spread by mosquitoes). In addition to providing a warning, all of the CDC notices contain a section detailing what travelers can do to prevent each disease.

[12] See, e.g., L. Alvarez & P. Belluck, "Pregnant Women Advised to Avoid Travel to Active Zika Zone in Miami Beach," The New York Times, August 19, 2016, available at https://www.nytimes.com/2016/08/20/science/5-zika-cases-were-transmitted-in-miami-beach-florida-governor-says.html?_r=0 (last visited August 7, 2017); S. Scutti, "Experts warn of increases in tick-borne Powassan virus," CNN, May 3, 2017, available at http://www.cnn.com/2017/05/03/health/powassan-tick-virus/ (last visited August 7, 2017); R. Ferris, "One sign that 2017 will be a bad year for Lyme disease," CNBC, March 6, 2017, available at www.cnbc.com/2017/03/06/one-sign-that-2017-will-be-a-bad-year-for-lyme-disease.html (last visited August 7, 2017); R. Dawood, "Tick-borne encephalitis threat in central Europe," The Telegraph, June 27, 2008, available at http://www.telegraph.co.uk/travel/travelnews/2202634/Tick-borne-encephalitis-threat-in-central-Europe.html (last visited August 7, 2017).

disease might cause, and whether and how the disease, if contracted, may be treated. With all of this information in hand, the individual can make educated choices about whether to travel to an area where the disease is present and, if so, what protective measures should be taken, in light of the individual's particular tolerance to risk.

Many measures are available to protect against insect-borne diseases. They include staying away from areas where the insects at issue are known to proliferate, using an appropriate insect repellent, pretreating clothing or gear with the insecticide permethrin, covering exposed skin with clothing and/or hats, showering soon after coming indoors, sleeping in screened areas or with a bed net, and, in the case of ticks, checking one's body thoroughly to find them before they can attach. See Centers for Disease Control and Prevention, "Avoid Bug Bites," available at https://wwwnc.cdc.gov/travel/page/avoid-bug-bites (last visited August 7, 2017), "Diseases Spread by Ticks," available at https://wwwnc.cdc.gov/travel/page/diseases-spread-by-ticks (last visited August 7, 2017). With some insect-borne diseases, preventive medicines or vaccinations are available. If an insect-borne disease is contracted, early recognition of symptoms can ensure that treatment is sought promptly, which, in some instances, could make a difference in the ultimate outcome.

Information directed at travelers about insect-borne diseases, and the measures to protect against them, is not hard to come by. It is freely available on the travel pages published by the CDC;[13] see footnote 11 of this

[13] There was a consensus among the witnesses at trial that the CDC is a standard and primary source used by travel professionals to determine the risks present in a particular area when planning a trip to that area. The defendant's expert David Freedman, a physician who is certified in infectious diseases, tropical and travel medicine, and epidemiology, testified that "the CDC is the [source] that would be regarded as the standard for [travel medicine advice] . . . . The CDC are our national guidelines for travel medicine." Thompson agreed: "The standard [sources] that we reference

opinion; and, further, on websites maintained by other foreign governments.[14] Additionally, as the evidence in this case demonstrated, there are many commercially produced publications that track and compile information for travelers about insect-borne diseases and the areas in which they are endemic.

In light of the foregoing, we believe that the normal expectations of participants in a school sponsored educational trip abroad, involving minor children, are that the organizer of the trip would take reasonable measures to warn the participants and their parents about the serious insect-borne diseases that are present in the areas to be visited and to protect the children from those diseases. School personnel who are organizing an educational trip abroad typically will have superior knowledge of travel planning in general, and the trip itinerary in particular, and, as explained previously, have a general responsibility to protect the minors in their charge while they are away from the custody of their parents. Given the potential dangers posed by serious insect-borne diseases, the existence of methods by which to avoid such diseases and the availability of useful information about them, trip participants naturally would expect the organizer of the trip to pass along appropriate warnings and to use ordinary care to minimize the disease risks posed by the insects in the particular areas to be visited. Trip organizers, for their part, likely would agree that reasonable protective measures, tailored to the risk, are doable and appropriate.[15] Accordingly, we conclude that the first factor

are the CDC, that's the first and foremost . . . ." McKenzie, too, stated that in evaluating travel related health risks "the obvious and primary [sources] in the [United States] would be the CDC and the State Department."

[14] See, e.g., Travel Health Pro, "Diseases in Brief," available at https://travelhealthpro.org.uk/diseases (last visited August 7, 2017) (travel health website established under United Kingdom Department of Health).

[15] In the present case, the defendant essentially has admitted as much. As the District Court recounted, "[a]t trial, Head of School Malcolm McKenzie testified that the school has an unquestionable duty to protect the kids from

of the public policy analysis supports the imposition of a duty on a school organizing a trip abroad to warn about, and to protect against, serious insect-borne diseases.

We turn next to the second and third factors of the analysis, namely, the public policy of encouraging participation in the activity at issue, while weighing the safety of the participants, and the avoidance of increased litigation. We recognize, as we must, that there are many benefits to international educational travel, and that it undeniably is the public policy of Connecticut to promote such travel. See General Statutes § 10-27 (a) ("[i]t shall be the policy of the state to encourage its students, teachers, administrators and educational policy makers to participate in international studies, international exchange programs and other activities that advance cultural awareness and promote mutual understanding and respect for the citizens of other countries"). We disagree, however, that recognizing that a school's general duty to protect its students includes the responsibility to take reasonable measures to warn about, and to protect against, serious insect-borne disease risks will have a chilling effect on

dangerous conditions and injuries wherever it can. . . . McKenzie further testified that the school warns students of the risk of malaria [when organizing trips] in tropical regions . . . and it requires students to take steps to prevent infection. . . . Thompson also affirmed that the school had a duty to determine if there were disease risks on the [China] trip and, specifically, to protect [the plaintiff] against [insect-borne] disease." (Citations omitted; internal quotation marks omitted.) Relatedly, the defendant's travel materials addressed the need for immunizations and other medical issues. There was also ample evidence at trial that the defendant took measures to warn students against the risk of Lyme disease, another tick-borne illness, at its Lakeville campus, and to protect them against that risk. The school's approach is undoubtedly correct. See 2 Restatement (Second), supra, § 314A, comment (d), p. 119 ("[t]he duty to protect the other [in custody] against unreasonable risk of harm extends to risks . . . arising from forces of nature or animals").

such travel.[16] Rather, it should have the salutary effect of promoting safety by ensuring that appropriate warnings are given and appropriate protective measures are taken. Compare *Ruiz* v. *Victory Properties, LLC*, supra, 315 Conn. 340–41 (recognizing duty of landlord to keep common area of property, where children are known to play, free of construction debris is likely to prompt responsible behavior because maintaining common areas is neither costly nor time-consuming; complete sanitization is not required, only "reasonable steps to protect against foreseeable injuries to children"), with *Lawrence* v. *O & G Industries, Inc.*, 319 Conn. 641, 659, 126 A.3d 569 (2015) (declining to recognize duty that "fail[ed] to provide a corresponding increase in safety"). Travel, of course, will always entail certain risks, some of which cannot be eliminated or reduced. The elimination of *unnecessary risks*, i.e., those that can be minimized with little effort, however, should encourage, rather than dampen, enthusiasm for traveling abroad. Cf. *Jagger* v. *Mohawk Mountain Ski Area, Inc.*, 269 Conn. 672, 703, 849 A.2d 813 (2004) (recognizing that skiers had duty of care to fellow skiers because "requiring skiers to participate in the reasonable manner prescribed by the rules of the sport actually will promote participation in the sport of skiing" by remedy-

[16] In fact, the sizeable verdict in this case, and the District Court's refusal to set it aside on the basis that no such duty existed, has not caused the defendant to cease offering its international travel programs. Rather, according to the defendant's website, nearly one quarter of its students still participate in these programs annually. See The Hotchkiss School, "Travel Programs," available at https://www.hotchkiss.org/academics/travel-programs (last visited August 7, 2017).

The defendant contends that this case already has spurred additional, unwarranted litigation, drawing our attention to an action that was filed by the plaintiff's attorney on behalf of another minor who contracted Lyme disease while at camp. See *Horowitz* v. *YMCA Camp Mohawk, Inc.*, United States District Court, Docket No. 3:13-CV-01458 (SRU) (D. Conn. 2013). That case apparently has been terminated with a confidential settlement. In the absence of any information as to the facts of the matter or the terms of its settlement, we decline to speculate as to its import, if indeed there is any.

ing harms and protecting safety). For risks that cannot be fully neutralized, appropriate warnings likely will suffice to satisfy the duty of care. See 1 Restatement (Third), supra, § 18, comment (h), p. 210. We emphasize that the duty to warn and protect does not amount to an absolute guaranty of safety, nor will it require, in every instance, that every possible precautionary measure be taken. Rather, the scope of the duty necessarily will vary, depending on the risk posed by the particular insect-borne illness at issue, the ages of the participants in the school sponsored trip, and all of the attendant circumstances.

In regard to the potential for increased litigation, we are skeptical that recognition of a school's duty to warn about, or protect against, a serious insect-borne illness when organizing an educational trip abroad will lead to a flood of similar actions. Our research has disclosed a dearth of claims with fact patterns similar to the present case, perhaps because the incidence of students contracting serious insect-borne diseases while on educational trips abroad, when appropriate protective measures are taken, is relatively uncommon. Again, information about insect-borne diseases, and the methods to protect against them, is readily available to travel professionals in a number of resources. See footnotes 11 and 13 of this opinion.

Additionally, the mere recognition of a legal duty by no means creates an open and shut case for every potential plaintiff who may contract an insect-borne disease while on an educational trip abroad. "A cause of action in negligence is comprised of four elements: duty; breach of that duty; causation; and actual injury." (Internal quotation marks omitted.) *Lawrence* v. *O & G Industries, Inc.*, supra, 319 Conn. 649. Thus, recognition of a duty affords students who contract insect-borne diseases on educational trips abroad only an opportunity to prove that the disease at issue was fore-

seeable, that the school failed to appropriately warn of the danger of the disease and/or to take reasonable precautionary measures and that such failure was a substantial cause of the illness. As always, principles of comparative negligence will apply. *Vendrella* v. *Astriab Family Ltd. Partnership*, 311 Conn. 301, 325, 87 A.3d 546 (2014). In the case of public institutions, discretionary act immunity may be invoked. See General Statutes § 52-557n (a) (2) (B). It is pure speculation, therefore, that our holding today will open the floodgates to let loose a wave of future litigants who inevitably will prevail. Cf. *Ruiz* v. *Victory Properties, LLC*, supra, 315 Conn. 339–40 (imposing duty is not tantamount to imposing strict liability; it merely affords plaintiff "opportunity to prove to a jury that [her] injuries were foreseeable, that the defendant failed to take reasonable steps to avoid them, and that this failure was a substantial factor in bringing about those injuries"); see also *Doe* v. *DeSoto Parish School Board*, supra, 907 So. 2d 281 ("before a school board can be found to have breached the duty to adequately supervise the safety of students, the risk of unreasonable injury must be foreseeable, constructively or actually known, and preventable if a requisite degree of supervision had been exercised" [internal quotation marks omitted]); *Prier* v. *Horace Mann Ins. Co.*, supra, 351 So. 2d 268 ("[A] teacher is not liable in damages unless it is shown that he or she, by exercising the degree of supervision required by the circumstances, might have prevented the act which caused the damage, and did not do so. It also is essential to recovery that there be proof of negligence in failing to provide the required supervision and proof of a causal connection between that lack of supervision and the accident."); *Henderson* v. *Simpson County Public School District*, supra, 847 So. 2d 857 (although "[p]ublic schools have the responsibility to use ordinary care and to take reasonable steps to mini-

mize foreseeable risks to students thereby providing a safe school environment . . . [t]here is no liability predicated on lack or insufficiency of supervision where the event in connection with which the injury occurred is not reasonably foreseeable" [citation omitted; internal quotation marks omitted]); *Mirand* v. *New York*, supra, 84 N.Y.2d 50 ("[e]ven if a breach of the duty of supervision is established, the inquiry is not ended; the question arises whether such negligence was the proximate cause of the injuries sustained").[17]

Notably, in several of the cases that we have cited herein in support of the general principle that a school has a duty to protect the students in its custody, the plaintiffs ultimately did not prevail due to their inability

[17] The facts of this case are illustrative. The plaintiff did not prevail simply because of the existence of a legal duty; rather, she produced compelling evidence that the contraction of tick-borne encephalitis on Mount Panshan was foreseeable; see footnote 7 of this opinion; and that the defendant's various failures to exercise reasonable care caused her to contract that illness. In regard to those failures, we find the District Court's observations to be apt: "The school assumes that if public policy allows the [plaintiff] to bring these claims, it could only avoid liability if it chose the most extreme prophylaxis, [b]ut that is not necessarily the case. Here, [the defendant] made no attempt to warn students about insects or to protect students against insect-borne disease. This is not a case where the school provided students with simple, accurate advice about the risk of insect-borne disease and then a quick, gentle reminder to apply bug spray before hiking. The jury may well have found for the defendant had [it] taken those two precautions but not instructed its teachers to apply the [bug] spray onto students' skin or failed to insist that students wear long sleeves and long pants. *Too much went wrong* in the spring and summer of 2007 for this case to resolve the question of the minimum amount of care required for a school to discharge its duty to protect students from insect-borne disease on school trips abroad." (Emphasis added.) We note in this regard that the third public policy factor does not require the minimization of litigation at all costs, but rather, "focuses upon the diminishment of an *inappropriate* flood of litigation." (Emphasis in original.) *Jagger* v. *Mohawk Mountain Ski Area, Inc.*, supra, 269 Conn. 703. Nevertheless, if the recognition of a duty of care encourages potential defendants to exercise reasonable care and take protective measures, "litigation is unlikely to increase; it may even decrease." *Monk* v. *Temple George Associates, LLC*, 273 Conn. 108, 120, 869 A.2d 179 (2005).

to satisfy other elements of their negligence claims. See, e.g., *Prier* v. *Horace Mann Ins. Co.*, supra, 351 So. 2d 268–69 (although school had duty to protect child from foreseeable injuries, duty was not breached when trash burner that caused injury was not inherently dangerous and had been used without incident for forty years); *Graham* v. *Montana State University*, supra, 235 Mont. 289 (although defendant university had duty to supervise minor student attending summer program, it was not liable for her injuries sustained in motorcycle accident because proximate cause of injuries was negligence of another student who was operating motorcycle); *David* v. *New York*, supra, 40 App. Div. 3d 573–74 (although defendant school had duty to adequately supervise students on hayride, that duty was not breached because student-teacher ratio was adequate and there was no prior indication of hazard).

As we previously have explained, increased litigation may result in those cases in which, by holding that a duty exists, we effectively are "recognizing a new cause of action or otherwise breaking new ground . . . ." *Ruiz* v. *Victory Properties, LLC*, supra, 315 Conn. 340; see, e.g., *Lawrence* v. *O & G Industries, Inc.*, supra, 319 Conn. 659–60 (declining to hold that construction companies owe duty of care to workers on job site who lose work and thereby suffer purely economic harm due to accident caused by companies' negligence, because expanding companies' liability to encompass such claims likely would increase greatly pool of potential claimants); *Jarmie* v. *Troncale*, 306 Conn. 578, 614, 50 A.3d 802 (2012) (declining to extend doctor's duty to warn patient that medical condition could impair driving ability to third party injured in accident caused by patient "because it would open the door to an entirely new category of claims against health care providers . . . thereby greatly expanding [their] liability . . . and creating an additional burden on the courts," ulti-

mately "driving up health care costs"). Such is not the case here. Rather, the duty to warn students about, and to protect them against, foreseeable insect-borne diseases is but one specific aspect of the already well established general duty of schools to take reasonable measures to ensure the safety of the minors over whom they have assumed custody. We conclude that the second and third public policy factors support the imposition of a duty on a school to warn about, and protect against, the risk of serious insect-borne diseases when organizing a trip abroad.

We turn to the final public policy factor, the decisions of other jurisdictions. Our research has not disclosed any decision that truly is analogous to the present one. We have reviewed the cases cited by the parties and the amici in addressing this factor and find them to be largely unhelpful. The cases on which the plaintiff relies involve very different types of injuries and therefore provide support only for the general proposition that schools taking custody of minor children are responsible for their protection and care. See, e.g., *Shin* v. *Sunriver Preparatory School, Inc.*, 199 Or. App. 352, 359, 111 P.3d 762 (sexual assault by parent and resultant emotional harm), rev. denied, 339 Or. 406, 122 P.3d 64 (2005); see also *Bellman* v. *Cedar Falls*, supra, 617 N.W.2d 15 (child killed when struck by golf cart commandeered by kindergarteners). Cases seemingly favoring the defense, because they absolve defendants of liability for injuries caused to others by insects, concern claims brought by adult plaintiffs under theories of premises liability, a substantially different context. See, e.g., *Riley* v. *Champion International Corp.*, 973 F. Supp. 634, 642–43 (E.D. Tex. 1997); *Belhumeur* v. *Zilm*, 157 N.H. 233, 236–38, 949 A.2d 162 (2008). In addition, many of the cited cases turn on the issue of foreseeability, a question which, as we have explained,

is not before us.[18] See, e.g., *Rodgers* v. *La Quinta Motor Inn*, 316 Ark. 644, 647, 873 S.W.2d 551 (1994); *Butcher* v. *Gay*, 29 Cal. App. 4th 388, 400–401, 404, 34 Cal. Rptr. 2d 771 (1994); *Rhodes* v. *B. C. Moore & Sons, Inc.*, 153 Ga. App. 106, 107, 264 S.E.2d 500 (1980); *David* v. *New York*, supra, 40 App. Div. 3d 574. For these reasons, we conclude that the fourth public policy factor in the present case is essentially neutral.

The defendant insists that there should be no duty to warn or to protect in the circumstances of this case because the chances of the plaintiff contracting tick-borne encephalitis were remote. Although, in a given case, the rarity of a particular illness should be weighed by the jury when determining whether its contraction was foreseeable, or whether the warnings given and protective measures taken by a school satisfied the duty of care, it is not relevant to a public policy analysis, which should be undertaken by a court without reference to the facts of a particular case.[19]

Although the question of whether the defendant properly was proven to be negligent is not before us, we

[18] See footnote 7 of this opinion.

[19] "[T]he Restatement (Third) [supra] explains that because the extent of foreseeable risk depends on the specific facts of the case, courts should leave such determinations to the trier of fact unless no reasonable person could differ on the matter. Indeed, foreseeability determinations are particularly fact dependent and case specific, representing a [factual] judgment about a course of events . . . that one often makes outside any legal context. So, by incorporating foreseeability into the analysis of [public policy], a court transforms a factual question into a legal issue and expands the authority of judges at the expense of juries or triers of fact.

"That is especially peculiar because decisions of foreseeability are not particularly legal, in the sense that they do not require special training, expertise, or instruction, nor do they require considering far-reaching policy concerns. Rather, deciding what is reasonably foreseeable involves common sense, common experience, and application of the standards and behavioral norms of the community—matters that have long been understood to be uniquely the province of the finder of fact." (Footnotes omitted; internal quotation marks omitted.) *A.W.* v. *Lancaster County School District 0001*, supra, 280 Neb. 212.

close with the following observation. Although we agree that tick-borne encephalitis is not a widespread illness, when it strikes, the results can be devastating. At the same time, some of the measures one might take to protect against it are simple and straightforward—covering exposed skin, applying insect repellent containing DEET,[20] closely checking one's body for ticks and/or avoiding the woods in areas where the disease is known to be endemic. The case thus brings to mind the risk-benefit calculus articulated long ago by Judge Learned Hand to determine whether, in given circumstances, reasonable care has been exercised. Pursuant to that formulation, both the likelihood *and* the gravity of potential harm should be taken into consideration, as well as the burden of taking adequate precautions to prevent that harm from occurring. See *United States* v. *Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). In short, "[g]iven a balancing approach to negligence, even if the likelihood of harm stemming from the actor's conduct is small, the actor can be negligent if the severity of the possible harm is great and the burden of precautions is limited." 1 Restatement (Third), supra, § 3, comment (f), p. 31; see also 3 F. Harper et al., Harper, James & Grey on Torts (3d Ed. 2007) § 16.9 (2), p. 523 ("[i]f the harm that may be foreseen is great, conduct that threatens it may be negligent even though the statistical probability of its happening is very slight indeed"); 3 F. Harper et al., supra, § 16.9 (3), p. 528 ("the law imposes liability for failure to take precautions, even against remote risks, if the cost of the pre-

[20] Stuart Rose, a physician with expertise in travel medicine who provided expert testimony for the plaintiff, testified that he, like any competent travel medicine practitioner, would give the same advice as that published on the CDC website to protect against tick bites and that DEET based insect repellents, when properly applied, are 80 to 100 percent effective against ticks. In Rose's opinion, if the plaintiff had employed tick protection measures, she would not have contracted tick-borne encephalitis. The jury apparently credited this testimony.

cautions would be relatively low"). When schools are fulfilling their duty to supervise students in their custody, these admonitions should be taken into account.

In sum, we conclude that the public policy of Connecticut does not preclude imposing a duty on a school to warn about or to protect against the risk of a serious insect-borne disease when organizing a trip abroad. For that reason, we answer the first certified question in the affirmative.

II

We turn to the second certified question, whether the damages award of approximately $41.5 million, which included noneconomic damages of $31.5 million, warranted a remittitur. We conclude that the award, although sizeable, fell within the necessarily uncertain limits of just damages. Accordingly, we answer the second certified question in the negative.

The following procedural history is relevant. After the jury returned a verdict in the plaintiff's favor and awarded damages of approximately $41.5 million, $31.5 million of which were awarded for pain and suffering, the defendant challenged the award, seeking a remittitur of the noneconomic portion. The defendant did not claim that there was any jury impropriety but, rather, contended that the award was excessive as a matter of law. The District Court, in a comprehensive memorandum of decision, rejected this claim and declined to order a remittitur. The following additional facts are recounted in that court's decision.

Ten days after visiting Mount Panshan, while still in China, the plaintiff began to suffer from a headache, a fever and wooziness. She grew disoriented and was taken to a local hospital. When her condition rapidly deteriorated, the local hospital transferred her to a Beijing hospital. After the plaintiff's parents were con-

tacted, they flew from New York, where the family resides, to Beijing. When they arrived, the plaintiff was partially paralyzed and could not speak; thereafter, she became semicomatose.[21] The plaintiff's parents then had her airlifted to New York, where she was admitted to New York-Presbyterian Hospital.

After a week in the hospital and a month at a rehabilitation facility, the plaintiff's condition stabilized and improved, but she remains permanently disabled. Most markedly, she cannot speak, but can only utter soft, monosyllabic, childlike sounds. The plaintiff has limited dexterity in her hands, particularly in her fingers, which are too stiff to bend easily. This inhibits the fine motor skills necessary to facilitate typing. The plaintiff also has limited control over her facial muscles, causing her to drool, to have difficulty eating and swallowing, and to exhibit socially inappropriate facial expressions.

The plaintiff has compromised brain functioning, particularly in the area of executive function, which makes it difficult for her to construct multistep solutions to everyday problems. As a consequence, she scores low on tests that gauge problem solving ability. Although her verbal comprehension scores remain at preinjury levels—in the ninety-sixth percentile—her reading comprehension and math comprehension scores have fallen to the third and first percentiles, respectively. Her scores on perceptual reasoning also are low, in the twelfth percentile. In short, although she remains an intelligent person, she has difficulty using her intelligence.

[21] At trial, the plaintiff's mother described her condition in the Beijing hospital: "[S]he was curled up and had her arms like this . . . looking up to the ceiling and totally like she was retarded and in shock and couldn't move and [was] frozen. . . . She couldn't speak. She couldn't move. Her eyes were rolled up, almost behind her head. It was just the [most] horrific picture a mother could ever, ever imagine seeing." Because the plaintiff's condition was yet to be diagnosed, and her doctors feared that it was contagious, her parents were not allowed to touch her.

As the District Court explained, however, the plaintiff "is in other ways normal. She still experiences the world much the same way as a person without a brain injury might—she understands what happens around her, she reads, she writes, she feels, she has opinions, and she dreams about her future." With assistance and accommodations, the plaintiff was able to finish high school and, at the time of trial, was enrolled in college.

The District Court commented extensively on the evidence of the plaintiff's suffering, characterizing her condition as "a perfect storm of symptoms that, taken together, magnify individual deficits into a debilitating and humiliating disability." It explained: "[The plaintiff] cannot talk. . . . She cannot communicate through sign . . . nor can she type quickly enough to allow a computer to generate audible words at a natural speed—it takes her a long time to produce a short phrase.[22] . . . [The plaintiff] is not only mute; she cannot have a sustained or rewarding social exchange with another person. [The plaintiff] cannot loosen her facial muscles enough to register her emotions accurately. . . . She cannot tighten her muscles when they slacken, which means she often drools so profusely that strangers stare at her in public places. . . . [The plaintiff] always looks like she is flashing a wide-eyed smile, and she sometimes wears wrist bands to mop her saliva. Her facial expressions alternately alienate or disgust the people she attempts to befriend. [The plaintiff] lacks cognitive skills; in particular, she has limited executive function . . . [b]ut she also has retained much of her raw, preinjury intelligence. . . . [The plaintiff's] cognitive injuries are greater than simply being unable to work through complex problems—she perceives the right solution but cannot implement it. As the [plain-

[22] At trial, the plaintiff testified by typing answers to questions into a machine, which would convert the written answers into a computer generated voice.

tiff's] counsel described, [the plaintiff] 'is like a world-class sprinter forced to live in a box for the next 66 years,' " i.e., the plaintiff's life expectancy at the time of her injury. (Citations omitted; footnote added.)

In the District Court's view, the "evidence supported the theory that [the plaintiff's] injuries are uniquely cruel." The court recounted testimony from both of the plaintiff's parents, and from other witnesses, that she had no friends or social life and lived an isolated existence, with her only social contact being online. It noted the plaintiff's belief, to which she had testified, that she will never date or have a family, but, rather, will become an "old spinster." The court further summarized the expert testimony, stating "that it would be difficult for [the plaintiff] to perform the basic tasks necessary to manage her own life, let alone ensure the growth, health and safety of a child."

Describing the emotional effect of her circumstances, the District Court explained that her "solitude stings her acutely," that she had contemplated suicide and that she feels shame when strangers gawk at her in restaurants as she struggles to eat, in a manner described by her father as childlike. It noted expert testimony that the plaintiff was at future risk for depression as her life became less structured. The court continued: "[The plaintiff's] heart broke when a boy that she dated prior to her trip to China dumped her and posted cutting remarks about her on Facebook. . . . She rages when people assume that she suffers from severe mental retardation, and she cannot correct that impression. . . . *Perversely*, [*the plaintiff*] *is arguably in a more emotionally compromised position than some people with more profound cognitive impairments because they may have the odd blessing of not understanding the depth of others' rejection of them. Thus, according to witnesses*, [*the plaintiff*] *lives in a peculiar hell: she knows what she has lost, cannot find*

cathartic expression for that loss and is treated as if she has lost far more. Because she has a normal life expectancy, she may suffer alone in this state for the next sixty-plus years." (Citations omitted; emphasis added.)

The District Court also addressed the plaintiff's physical pain and suffering, namely, her endurance of "a grueling illness and recovery," which at its worst had her paralyzed and semicomatose. For a period of time, the plaintiff had to be fed through a feeding tube that she described as "so painful . . . like swallowing pool water three times a day." The plaintiff spent weeks in rehabilitation relearning basic tasks. She remains physically limited in many ways, including an impeded ability to use her arms, hands and legs due to extreme muscle tightness and stiffness. Moreover, the evidence at trial was that, given the nature of her brain injury, she would not be making any further meaningful improvement.

In sum, the District Court stated, "[w]itnesses' accounts and [the court's] own courtroom observations of [the plaintiff's] emotional and physical suffering depict a miserable life." Although the court allowed that the plaintiff had retained some abilities and had partaken in some positive experiences since her illness, "the issue here is not whether [the plaintiff] might cobble together fulfilling moments during her life, [but] whether the jury reasonably could have found that she rarely will be able to do so, and, thus, fairly awarded [the plaintiff] a large amount of money to compensate her for that loss." In the court's view, the plaintiff had "provided the jury with more than enough evidence to reach that pessimistic conclusion."

The District Court rejected the defendant's claim that the jury's award was simply excessive as a matter of law, noting the defendant's concession that there was

no evidence "that the [jurors had] ignored the law, acted out of punitive animus toward the defendant or otherwise failed to fulfill their duties responsibly." Rather, the jury "struck [the court] as [diligent] attentive, serious, and dedicated." The court surveyed some cases in which large damages awards had been rendered, concluding that the injuries at issue in those cases, when considered together, provided a fair benchmark and an assurance that the award in this case was not excessive. Specifically, when the plaintiff's award and those from the case law were broken down into annual rates of compensation, on the basis of each injured party's remaining life expectancy, the plaintiff's award actually fell on the lower end of the resulting range of values.

The District Court concluded by propounding unanswerable questions: "What is the price of relying on your parents to find you a prom date? . . . How much money replaces the loss of the joy you felt when playing the piano? . . . Can you calculate the cost of missing your teenage years, of never maturing socially and emotionally beyond the age of fifteen?" (Citations omitted.) It thereafter upheld the award as falling within the range of reasonable verdicts.

We turn to the applicable law. In Connecticut, "the proper standard of review of a trial court's decision to grant or deny a motion to set aside a verdict as excessive as a matter of law is that of an abuse of discretion. . . . Accordingly, the ruling of the [District] [C]ourt on the motion to set aside the verdict as excessive is entitled to great weight and every reasonable presumption should be given in favor of its correctness." (Citation omitted; internal quotation marks omitted.) *Saleh* v. *Ribeiro Trucking, LLC*, 303 Conn. 276, 282, 32 A.3d 318 (2011). Additionally, where, as here, a trial court and a jury have concurred in their determination that a particular damages award is appropriate, that circum-

stance provides "a persuasive argument for sustaining the action of the court on the motion." (Internal quotation marks omitted.) *Birgel* v. *Heintz*, 163 Conn. 23, 30, 301 A.2d 249 (1972); see also *Camp* v. *Booth*, 160 Conn. 10, 12, 273 A.2d 714 (1970) ("[t]he refusal of the trial court to disturb the jury's determination adds support to the propriety of the verdict").

The reason for such a deferential standard is clear. "Litigants have a constitutional right to have factual issues resolved by the jury. . . . This right embraces the determination of damages when there is room for a reasonable difference of opinion among fair-minded persons as to the amount that should be awarded. . . . This right is one obviously immovable limitation on the legal discretion of the court to set aside a verdict, since the constitutional right of trial by jury includes the right to have issues of fact as to which there is room for a reasonable difference of opinion among fairminded men passed upon by the jury and not by the court." (Citations omitted; internal quotation marks omitted.) *Mather* v. *Griffin Hospital*, 207 Conn. 125, 138, 540 A.2d 666 (1988). Accordingly, "we consistently have held that a court should exercise its authority to order a remittitur rarely—only in the most exceptional of circumstances"; *Saleh* v. *Ribeiro Trucking, LLC*, supra, 303 Conn. 280; and where the court can articulate "very clear, definite and satisfactory reasons . . . for such interference." (Internal quotation marks omitted.) Id., 283.

"Proper compensation cannot be computed by a mathematical formula, and there is no iron-clad rule for the assessment of damages." *Campbell* v. *Gould*, 194 Conn. 35, 40, 478 A.2d 596 (1984). "In determining whether to order remittitur, the trial court is required to review the evidence in the light most favorable to sustaining the verdict. . . . Upon completing that review, the court should not interfere with the jury's

determination except when the verdict is plainly excessive or exorbitant. . . . The ultimate test which must be applied to the verdict by the trial court is whether the jury's award falls somewhere within the necessarily uncertain limits of just damages or whether the size of the verdict so shocks the sense of justice as to compel the conclusion that the jury [was] influenced by partiality, prejudice, mistake or corruption. . . . The court's broad power to order a remittitur should be exercised only when it is manifest that the jury [has] included items of damage which are contrary to law, not supported by proof, or contrary to the court's explicit and unchallenged instructions." (Citation omitted; internal quotation marks omitted.) *Saleh* v. *Ribeiro Trucking, LLC*, supra, 303 Conn. 281. This court has upheld a remittitur order only when we "have laid before us a very clear and striking case of indubitable wrong, so clear and striking as to indicate the influence of undue sympathy, prejudice or corruption on the verdict." (Internal quotation marks omitted.) Id., 283.

In regard to the type of damages at issue, this court has "long held that the loss of life's enjoyments is compensable in personal injury and wrongful death cases." *Mather* v. *Griffin Hospital*, supra, 207 Conn. 150. "Damages may be awarded for pain and suffering, past, present and future, resulting from the injuries so long as the evidence affords a basis for a reasonable estimate by the trier of fact of the amount." *Vajda* v. *Tusla*, 214 Conn. 523, 532, 572 A.2d 998 (1990). "[A]lthough it is difficult to measure emotional distress in terms of money, [a]n award of damages for pain and suffering is peculiarly within the province of the trier of fact . . . ." (Internal quotation marks omitted.) *Bhatia* v. *Debek*, 287 Conn. 397, 420, 948 A.2d 1009 (2008). Such is also the case with "compensation for activities in which the plaintiff engaged, prior to [her] injury, which, as a result of that injury, are now foreclosed to [her]."

Jerz v. *Humphrey*, 160 Conn. 219, 223, 276 A.2d 884 (1971). Those damages lie in an "extremely uncertain area . . . one in which it is quite impossible to assign values with any precision," and, therefore, are best left to a jury. Id.

Giving due consideration to the foregoing principles and the District Court's view of the evidence, we conclude that the noneconomic damages awarded in this tragic case, although clearly generous, fall within the acceptable range of just compensation. Although no formulaic process of review applies, we will make a few observations. First, there is no allegation that the jury in this case was prejudiced, incompetent or otherwise compromised, but only that its verdict was improperly large. In only the rarest of circumstances should the size of a verdict, standing alone, warrant setting aside that verdict. We do not believe such circumstances are present here. Importantly, the District Court's careful and thorough review of the verdict, and its ultimate decision to let it stand, provided an important check against any claim of undue sympathy. In upholding the verdict, the judge, who was in a position to evaluate the testimony firsthand and is guided by his oath, training and role as an impartial arbiter, concluded that such sympathy was not present. Second, the plaintiff in this case was very young and, despite her injuries, retained a long life expectancy. Accordingly, the period of time over which she is expected to suffer—sixty-six years—is an extensive one. Further, the evidence at trial suggested that the physical effects of her injuries will worsen as she ages and that her psychological condition will deteriorate as the structure characteristic to a young life abates. Additionally, the plaintiff eventually will lose the support of her parents which, by all accounts, was crucial to her recovery and relatively high functioning. Third, we see no fault in the District Court's assessment of the plaintiff's particular

set of injuries as uniquely cruel. Through the combination of an inability to speak, control her facial expressions and move her fingers effectively, she has completely lost the ability to have meaningful communication and interaction with other people. Although one can certainly conceive of physical injuries more extreme than those suffered by the plaintiff, it is the destruction of the plaintiff's ability to connect with other people, along with her full awareness of the situation, that makes her suffering stand out. Similarly, a loss of the executive brain function that allows one to access and use intelligence, while at the same time retaining such intelligence, is particularly frustrating. Finally, the plaintiff's mother testified about her passions in life and her dreams, prior to her injury, which included sports, playing the piano and learning to speak foreign languages. The destructive effect of her injuries on these enjoyments and aspirations is painfully apparent.

The defendant invites us to examine the verdicts returned by other juries in other cases and to engage in an exercise of comparing which plaintiff's injuries are worse. We decline this invitation.[23] As we previously have explained, "[n]o one life is like any other, and the damages for the destruction of one furnish no fixed standard for others." (Internal quotation marks omitted.) *Katsetos* v. *Nolan*, 170 Conn. 637, 658, 368 A.2d 172 (1976); see also *Waldron* v. *Raccio*, 166 Conn. 608, 618, 353 A.2d 770 (1974). Consequently, "[i]t serves no useful purpose to compare a verdict in one personal injury case with the verdicts in other personal injury cases. . . . The question is one peculiarly within the

[23] Notably, however, the noneconomic damages award in this case is not the largest verdict of its kind in Connecticut. See *D'Attilo* v. *Viscarello*, Docket No. UWY-CV-05-4010135-S, Superior Court, judicial district of Waterbury (May 25, 2011) (awarding $50 million in noneconomic damages for forty-three years of expected pain and suffering), available at 2011 WL 2489003 (West's Jury Verdict and Settlement Summary 2015).

province of the jury. Juries may differ widely in the conclusions which they reach in what may be apparently similar cases, and, in fact, in any given case one jury may arrive at a result substantially different from that of another jury." (Citations omitted.) *Birgel* v. *Heintz*, supra, 163 Conn. 34. In the absence of evident mistakes or partiality, however, we defer to the jury's judgment, as the District Court did here. For the foregoing reasons, we answer the second certified question in the negative.

We answer the first certified question, "Yes."

We answer the second certified question, "No."

No costs shall be taxed in this court to either the plaintiffs or the defendant.

In this opinion the other justices concurred.

McDONALD, J., concurring. With respect to the first certified question, I join part I of the majority opinion, which concludes that Connecticut public policy supports 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. I write separately with respect to the second certified question because, while I am compelled to agree with part II of the majority opinion that the trial court did not abuse its discretion in denying remittitur under the various standards we have long articulated, it is evident to me that our current remittitur jurisprudence is internally inconsistent and fails to provide clear guidance as to what constitutes an excessive verdict. Our muddled precedents are particularly problematic when noneconomic damages are challenged. Indeed, while the damages award in the present case shocks *my* conscience, our existing standard does not provide a recognized basis to conclude that the trial court's conclusion to the contrary was

improper. Because the parties have not challenged the existing standards, I write in the hope that this issue will be remedied—either legislatively or by this court—at the earliest appropriate opportunity.

I

The confusion in our remittitur jurisprudence begins with our guidance to the trial courts that are charged with applying it. The majority, drawing on our recent remittitur decisions, presents as a purportedly unified standard what a close examination reveals to be in fact at least four distinct and potentially contradictory standards that govern a court's decision whether to grant or deny a motion for remittitur: "In determining whether to order remittitur, the trial court is required to review the evidence in the light most favorable to sustaining the verdict. . . . Upon completing that review, [1] the court should not interfere with the jury's determination except when the verdict is plainly excessive or exorbitant. . . . [2] The ultimate test which must be applied to the verdict by the trial court is whether the jury's award falls somewhere within the necessarily uncertain limits of just damages or whether the size of the verdict so shocks the sense of justice as to compel the conclusion that the jury [was] influenced by partiality, prejudice, mistake or corruption. . . . The court's broad power to order a remittitur should be exercised [3] only when it is manifest that the jury [has] included items of damage which are contrary to law, not supported by proof, or contrary to the court's explicit and unchallenged instructions. . . . This court has upheld a remittitur order [4] only when we have laid before us a very clear and striking case of indubitable wrong, so clear and striking as to indicate the influence of undue sympathy, prejudice or corruption on the verdict." (Citation omitted; internal quotation marks omitted.)

As we previously have acknowledged, certain aspects of these tests—whether the damages award is plainly excessive or exorbitant, and whether it shocks the court's sense of justice[1]—are highly subjective, providing "vague guidance at best" to courts charged with applying them.[2] *Saleh* v. *Ribeiro Trucking, LLC*, 303 Conn. 276, 282, 32 A.3d 318 (2011). Other aspects of the standard, by contrast, aspire to objectivity, and suggest that an order of remittitur is appropriate *only* when the court can identify some sort of articulable legal error or when the damages awarded are without any evidentiary support.

It certainly is possible to reconcile these various expressions of the governing legal standard. It may be, for example, that the more objective standards flesh out the meaning of the more subjective ones, so that a trial court may find that an award is exorbitant or shocking only if the court also determines that the award arises from some identifiable jury bias or legal error. Or it may be that we have inadvertently agglomerated tests and standards that are in fact specific to distinct types of actions or damages. It would make sense, for instance, if an award of *economic* damages could be reduced (or increased, in the case of additur)[3]

[1] We have indicated that the terms " 'shocks the sense of justice' " and " 'shocks the conscience' " may be used interchangeably in this context. *Saleh* v. *Ribeiro Trucking, LLC*, 303 Conn. 276, 279 n.6, 32 A.3d 318 (2011).

[2] If the virtually unprecedented $31.5 million noneconomic damages award in the present case is not so shocking as to require remittitur, for example, one wonders on what basis a reviewing court could conclude that an award of $100 million, or $500 million, is too much. At oral argument, the counsel for the plaintiff Cara L. Munn volunteered that he would not trade places with her even for $1 billion. If that is the only check on the magnitude of unquantifiable noneconomic damages, then I fear that such awards are, effectively, unreviewable.

[3] A further question that may need to be addressed in the future is whether the same standards govern a trial court's decision to increase and to decrease a jury verdict. Although many of the considerations are no doubt the same, our state constitution may place greater restrictions on additur (which awards to a plaintiff damages not authorized by the jury) than on remittitur (which merely reduces some portion of the authorized damages). See gener-

only when the award is unsupported by the record evidence or has been calculated on the basis of some legally improper methodology. Compensation for less quantifiable *noneconomic* damages such as physical pain and emotional suffering, by contrast, might be reviewable only by a more amorphous "shocks the conscience" standard. In our most recent attempt to sort out this state's common law of remittitur, however, we have provided little clarity, unhelpfully holding only that "a trial court ordering a remittitur must set forth in the memorandum of decision clear, definite and satisfactory reasons for so ordering." *Saleh* v. *Ribeiro Trucking, LLC*, supra, 303 Conn. 283. Further guidance is necessary.

II

Although it is arguably possible to reconcile the various standards to be applied by the trial court, the same cannot be said for the standards by which we purport to review a trial court's decision to grant or deny a remittitur. The majority paradoxically notes that "the proper standard of review of a trial court's decision to grant or deny a motion to set aside a verdict as *excessive as a matter of law* is that of an *abuse of discretion*." (Emphasis added; internal quotation marks omitted.) This is precisely what prior case law has dictated. Nonetheless, this oxymoronic statement of the law would seem to subject purely legal determinations, which ordinarily are reviewable de novo, to a deferential and fact-specific abuse of discretion standard of review.

Since this peculiar iteration of the standard of review for remittitur decisions emerged in the early 1980s,[4]

ally *Dimick* v. *Schiedt*, 293 U.S. 474, 486–87, 55 S. Ct. 296, 79 L. Ed. 603 (1935) (applying federal constitution).

[4] The language at issue traces its origins to a 1982 public act. Prior to 1982, the authority of the trial court to order a remittitur derived both from the court's inherent common-law authority to supervise the trial process; *Buckman* v. *People Express, Inc.*, 205 Conn. 166, 174, 530 A.2d 596 (1987); *Baldwin* v. *Porter*, 12 Conn. 473, 485 (1838); and from General Statutes § 52-

228 and the associated rules of practice, Practice Book §§ 16-35 and 17-3. During that period, our cases generally recognized that (1) the trial court has "broad legal discretion" to grant or deny a motion for remittitur, (2) such discretion, however, is not unfettered, (3) appellate tribunals review a trial court's ruling on a motion for remittitur for a "clear abuse of . . . discretion," and (4) "[t]he proper test to be applied is to determine whether the award of damages falls somewhere within the necessarily uncertain limits of fair and reasonable compensation in the particular case, or whether the verdict so shocks the sense of justice as to compel the conclusion that the jury were influenced by partiality, prejudice, mistake or corruption." (Internal quotation marks omitted.) *Lee* v. *Lee*, 171 Conn. 1, 3, 368 A.2d 11 (1976).

In 1982, the legislature amended General Statutes (Rev. to 1981) § 52-216a, which barred a civil jury from being informed of the existence of a settlement or release agreement involving a joint tortfeasor but vested the trial court with discretion to reduce the verdict by the amount of the settlement/agreement, in response to a decision by this court concluding that the trial court's unfettered discretion to reduce the verdict impermissibly intruded on the constitutional role of the jury. See *Seals* v. *Hickey*, 186 Conn. 337, 350–53, 441 A.2d 604 (1982); see also *Peck* v. *Jacquemin*, 196 Conn. 53, 69, 491 A.2d 1043 (1985). Number 82-406, § 3, of the 1982 Public Acts eliminated the discretionary language and replaced it with language permitting remittitur or additur if the verdict is "excessive as a matter of law" or "inadequate as a matter of law," respectively. The expansive language and limited legislative history of the amendment raised the question of whether the legislature intended not only to address the concerns identified in *Seals* with respect to joint tortfeasor situations but to limit more generally the discretion of the trial courts to order remittiturs. The substantive legislative history of the amendment is limited to a brief statement by its cosponsor, Representative Alfred J. Onorato:

"What this amendment would do or attempt to do is to make Connecticut law consistent with the law in other states, and on a federal level in the determination of jury verdicts.

"Right now in Connecticut, whether a verdict is set aside by the court or whether remittitur is added, or whether there's an additur is in the discretion of the court.

"What this amendment would do would be to put those same safeguards on it that are in other states and are in the federal court system, that the only time a remittitur or an additur would be practical is when the court rules *as a matter of law* that the verdict is either excessive or inadequate. That's what this amendment would do. It would take the discretion out, and [the court] would have to find *as a matter of law* that the verdict was out of balance one way or the other." (Emphasis added.) 25 H.R. Proc., Pt. 19, 1982 Sess., pp. 6177–78.

Although the legislative history suggested an intent to bring Connecticut's law of remittitur into conformity with that of the federal courts and other states, my research indicates that many jurisdictions afforded their trial

Connecticut's appellate courts have struggled to apply it in a consistent and intelligible manner. Although most of our cases indicate that the decision to grant a remittitur is a discretionary determination that is reviewable only for clear abuse of discretion, in some instances we have indicated or implied that we will review a remittitur determination de novo, as a pure question of law, or, possibly, under both an abuse of discretion and a de novo standard. See, e.g., *Buckman* v. *People Express, Inc.*, 205 Conn. 166, 175, 176 n.10, 177, 530 A.2d 596 (1987) (stating that whether "amount of the verdict is 'exorbitant' and unjust in light of all of the evidence . . . raises a question of law," and concluding, contrary to trial court and solely on basis of size of award, that verdict was "so grossly excessive as to shock the conscience of this court"); *Peck* v. *Jacquemin*, 196 Conn. 53, 72, 491 A.2d 1043 (1985) ("[t]he trial court now makes its determination as a pure question of law"); see also *Wichers* v. *Hatch*, 252 Conn. 174, 181–82, 745 A.2d 789 (2000) (reviewing de novo trial court's additur order because court had concluded "as a matter of law" that it was required to increase award).

courts broad discretion in these matters at that time, and also that there was no single prevailing standard governing remittitur outside of Connecticut. See generally S. Cravens, "The Brief Demise of Remittitur: The Role of Judges in Shaping Remedies Law," 42 Loy. L.A. L. Rev. 247, 250 (2008) ("There is not tremendous consistency in the versions of remittitur employed in various state court systems across the country. . . . While wording of the standards may vary, the decision whether to grant a remittitur is generally committed to the sound discretion of the trial court."); I. Sann, "Remittiturs (and Additurs) in the Federal Courts: An Evaluation with Suggested Alternatives," 38 Case W. Res. L. Rev. 157 (1987) (canvassing federal jurisprudence); see also I. Sann, supra, 183 ("[t]he line drawn by courts in such cases has varied from court to court and from case to case"); I. Sann, supra, 187 ("[s]ome judges . . . seem to grant remittiturs in any case in which the judge disagrees with the verdict"). Accordingly, it is difficult to determine whether, in continuing to treat most remittitur decisions as discretionary matters, we have disregarded the will of the legislature as expressed explicitly in General Statutes § 52-216a.

We also have provided conflicting accounts of precisely how a trial court exercises its discretion in determining that an award is excessive as a matter of law. Compare, e.g., *Mahon* v. *B.V. Unitron Mfg., Inc.*, 284 Conn. 645, 665, 935 A.2d 1004 (2007) (only after finding that award is excessive as matter of law may court, in exercise of its discretion, reduce jury award), with *Alfano* v. *Insurance Center of Torrington*, 203 Conn. 607, 614, 525 A.2d 1338 (1987) (if court determines that award is excessive it is required to order remittitur, but amount remitted rests within court's discretion) and *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 110, 952 A.2d 1 (2008) (decision rests entirely within court's discretion).

Finally, our cases display some confusion over whether (1) General Statutes § 52-216a; see footnote 4 of this concurring opinion; now governs the granting and review of all remittitur claims, or (2) whether the common-law standard continues to govern most such claims, with § 52-216a governing only those remittitur decisions arising under circumstances in which a jury is unaware of the existence of a potentially relevant settlement or release agreement between a party and a joint tortfeasor. Compare *Bovat* v. *Waterbury*, 258 Conn. 574, 599, 783 A.2d 1001 (2001) ("[t]he express language of § 52-216a suggests that the statute applies solely to actions in which there are, or could be, joint tortfeasors"), with *Saleh* v. *Ribeiro Trucking, LLC*, supra, 303 Conn. 281 (reviewing remittitur pursuant to § 52-216a despite absence of any joint tortfeasors, release, or settlement agreement); see also *Wichers* v. *Hatch*, supra, 252 Conn. 186–87 (statute codifies common law of additur and remittitur).

III

The lack of clear and consistent standards for the review of excessive jury awards, particularly with

respect to noneconomic damages, is troubling on many levels. Neither the defendant, The Hotchkiss School, nor the insurers that underwrite the risks of schools similarly situated to the defendant that offer study abroad programs, possibly could have anticipated the magnitude of the verdict in the present case. The unfortunate consequences that may flow from the uncertainty created thereby include, among others, significantly increased premiums or policy exclusions for noneconomic damages, either of which might discourage schools and other organizations from offering such trips, which are broadly viewed as a beneficial educational and social experience.

The lack of clear and definite standards also is worrisome in light of the legal scholarship suggesting that civil damages awards may be tainted by socioeconomic and racial disparities. See, e.g., A. Chin & M. Peterson, "Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials," Institute for Civil Justice (Rand Corp. 1985) pp. v, viii, 29, 38–40 (reviewing 9000 civil jury verdicts in Illinois and concluding that race had "a pervasive influence on the outcomes," with black plaintiffs receiving substantially smaller awards than white plaintiffs for comparable injuries); see also *Martin* v. *Charleston Area Medical Center*, 181 W. Va. 308, 312, 382 S.E.2d 502 (1989) ("it is well documented that some jury awards are affected by the race of the plaintiff"). I am not aware of any empirical evidence that such disparities are present in Connecticut's civil justice system. Nor do I have any objective basis to conclude that the virtually unprecedented award in the present case would have been lower if the plaintiff Cara L. Munn[5] had been a member of a family of more modest means or of a historically disadvantaged minority

[5] Munn's parents, Orson D. Munn III and Christine Munn, were also named as plaintiffs in this matter. For simplicity, all references herein to the plaintiff are to Cara L. Munn.

group. Nevertheless, I could more readily comprehend the monumental verdict in this case if we had more objective standards by which to judge the excessiveness of a noneconomic damages award, standards that leave less space for biases, whether explicit or implicit, to manifest.

IV

Ultimately, if I were to review the damages award in the present case de novo, I likely would find that the award of $31.5 million in noneconomic damages so shocks my sense of justice as to compel the conclusion that the jury must have been motivated by sympathy for the plaintiff. I do not mean in any way to minimize the tragic and life altering injuries that the plaintiff has sustained. There is clear evidence of profound loneliness. She suffers the debilitating effects that often result when one has a visible disability. The prime of her youth is lost to her, and many of her childhood dreams are unattainable, or at least appear to be at this point in time.

At the same time, I cannot ignore the fact that juries frequently award noneconomic damages that are orders of magnitude lower to plaintiffs whose injuries are, by any objective standard, at least as grievous: individuals who spend each day of their lives in excruciating pain, or whose injuries leave them incapable of even the most basic forms of self-care and human interaction. Although much has been taken from the plaintiff, much abides. On the basis of testimony to the jury at trial, the plaintiff can still undertake travel, pursue her studies, engage in exercise, seek work, and play some sports. Although the plaintiff's suffering is substantial, the jury in the present case was not presented with any structured basis, or expert testimony, or quantitative evidence of any sort that would have led them to the $31.5 million figure or that reveals any nexus whatsoever

between the plaintiff's noneconomic injuries and this virtually unprecedented award. See *Munn* v. *Hotchkiss School*, 795 F.3d 324, 336 (2d Cir. 2015).

I return to where I began. Notwithstanding the untenable legal foundation on which we review these things, on the basis of our (internally inconsistent) precedents as they presently stand, I am compelled to conclude that the trial court did not abuse its discretion in denying remittitur in this case. The parties have not asked us to clarify our remittitur jurisprudence at this time, nor have they asked us to reconsider our oft-stated position that the denial of a motion for remittitur is, in most instances, reviewable only for abuse of discretion. Accordingly, because I perceive nothing in the record that would compel the conclusion that the United States District Court for the District of Connecticut abused its discretion in denying the defendant's motion, I agree with the majority that the answer to the second certified question is "no." If the legislature is not inclined to provide further guidance, however, then I trust that we will address these issues in due course.

ESPINOSA, J., concurring. In view of the questions that the United States Court of Appeals for the Second Circuit chose to certify to this court, I am compelled to agree with the majority's answers to those questions. Specifically, I agree that (1) it is the role of the legislature and not of this court to exempt schools from liability for remote harms such as insect-borne[1] disease that may befall students on study abroad programs, and (2) we must defer to the determination by the United States

[1] As the defendant, The Hotchkiss School, notes, the certified question is misleading insofar as ticks, the disease vector at issue in the present case, are not insects but arachnids, cousins of the spider and the mite. Following the convention that has been established in this case, I will use the term "insect-borne" as synonymous with the more accurate—but less ceremonious—term "bug-borne."

District Court for the District of Connecticut that the jury verdict, while disquietingly large, is not so clearly the result of partiality, prejudice, mistake or corruption that remittitur is required. I write separately to express my hope that the Court of Appeals will revisit its legal determination that there was sufficient evidence to support the jury's finding that the injuries suffered by the plaintiff Cara L. Munn[2] were reasonably foreseeable; see *Munn* v. *Hotchkiss School*, 795 F.3d 324, 329 (2d Cir. 2015); a question on which that court has not sought our counsel.

I

I begin by reviewing the relevant legal standards. As the Court of Appeals recognized; id., 329–30; our law permits a jury to find that a harm is foreseeable only if "an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was *likely* to result . . . ." (Emphasis added; internal quotation marks omitted.) *Sic* v. *Nunan*, 307 Conn. 399, 407, 54 A.3d 553 (2012). "[D]ue care does not require that one guard against eventualities which at best are too remote to be reasonably foreseeable." (Internal quotation marks omitted.) Id., 409. "Accordingly, the fact finder must consider whether the defendant knew, or should have known, that the situation at hand would obviously and naturally, even though not necessarily, expose [the plaintiff] to *probable* injury unless preventive measures were taken." (Emphasis added; internal quotation marks omitted.) *LePage* v. *Horne*, 262 Conn. 116, 124, 809 A.2d 505 (2002); see also id. (" 'ordinary care has reference to probabilities of danger rather than possibilities of peril' "); *Lodge* v.

[2] Munn's parents, Orson D. Munn III and Christine Munn, were also named as plaintiffs in this matter. For simplicity, I refer to Cara L. Munn alone as the plaintiff.

Arett Sales Corp., 246 Conn. 563, 575–76, 717 A.2d 215 (1998) ("[i]nasmuch as virtually all harms, in hindsight, are literally foreseeable . . . the law has rejected a literal foreseeability test as the fulcrum of duty" [citation omitted; internal quotation marks omitted]). Negligence is, therefore, to be distinguished from an accident, insofar as "an accident is an unexpected happening [whereas] negligence is based on something reasonably to be anticipated." *Higgins* v. *Connecticut Light & Power Co.*, 129 Conn. 606, 613, 30 A.2d 388 (1943).

Consistent with these principles, this court has found that a harm was not reasonably foreseeable, as a matter of law, when the injury, although not beyond the realm of the conceivable, could only be fairly characterized as highly improbable. See, e.g., *Sic* v. *Nunan*, supra, 307 Conn. 409 ("being thrust into the travel lane of oncoming traffic while one is lawfully stopped awaiting an opportunity to turn simply does not fall within the category of foreseeable risk"); *Lodge* v. *Arett Sales Corp.*, supra, 246 Conn. 577 ("the brake failure of a negligently maintained fire engine is beyond the scope of the reasonably foreseeable risks created by the transmission of a false alarm"); *Schiavone* v. *Falango*, 149 Conn. 293, 298, 179 A.2d 622 (1962) (not reasonably foreseeable that unattended child would climb and fall from exterior stairway railing); *Noebel* v. *Housing Authority*, 146 Conn. 197, 201–202, 148 A.2d 766 (1959) ("[i]t is unreasonable as a matter of law to charge the defendants with anticipation of the likelihood that . . . someone in a hurry might try to jump over [a fence comprised of rubber-covered wooden stakes], misjudge its height or his own agility, and fall"); *Goldberger* v. *David Roberts Corp.*, 139 Conn. 629, 630, 96 A.2d 309 (1953) (jury could not reasonably find it foreseeable that teenage camper, described as " 'problem child,' " having been instructed to dispose of wooden stick and

then left unsupervised, would swing stick in tent, resulting in broken fragment striking and injuring younger boy).[3] As I explain in the next part of this concurring opinion, none of the risks that we deemed to be legally unforeseeable in the cited cases was as demonstrably and quantifiably remote as the risk that the plaintiff would contract tick-borne encephalitis (TBE) or some other serious insect-borne illness during her brief field trip to Mount Panshan (Mt. Pan) in the Tianjin province of China.

II

A

The record reveals the following undisputed facts. The plaintiff was the first known United States citizen—and quite possibly the first foreign traveler—ever to contract TBE in China. She caught the disease at a popular tourist destination within commuting distance of Beijing—one that receives over 600,000 visitors each year, including more than 50,000 foreign tourists—in a province in which no human case had ever been reported.

TBE is an extremely rare disease. In total, only 10,000 to 12,000 individuals worldwide contract the disease

[3] The Court of Appeals, relying on our decision in *Ruiz* v. *Victory Properties, LLC*, 315 Conn. 320, 107 A.3d 381 (2015), a premises liability case, concluded that Connecticut courts construe foreseeability especially broadly as it relates to children. *Munn* v. *Hotchkiss School*, supra, 795 F.3d 330. All that we stated in *Ruiz*, however, is that the degree of care that is required vis-à-vis children varies according to their age and maturity, and that younger children may not appreciate the dangers inherent in their surroundings. *Ruiz* v. *Victory Properties, LLC*, supra, 332–33. The primary wild card in the present case is not, as in *Ruiz*, a *child's* conduct but, rather, the distribution of infected ticks and the epidemiology of the tick-borne virus. Accordingly, any inferences to be drawn from *Ruiz* about the unpredictability of children's behavior are largely irrelevant. To the extent that the plaintiff's own conduct and propensity to follow instructions is relevant to the foreseeability question, *Goldberger*, which involved a child much closer to the plaintiff's own age (albeit still several years younger), is more directly on point. *Goldberger* v. *David Roberts Corp.*, supra, 139 Conn. 629.

each year. Of those cases, the vast majority occur in Russia and central Europe. In China, the primary TBE risk in 2007 was understood to exist along China's far northern borders with Russia and Mongolia, hundreds of miles north of Mt. Pan. Depending on which disease distribution map one credited, Tianjin province was either completely outside or just on the outskirts of the recognized endemic area.

The plaintiff's expert testified that, even within endemic areas, the risk to travelers is low unless *extensive* outdoor activities are planned. Immunization against the disease is not available in the United States. In countries in which vaccination was available in 2007, it was recommended only " 'for prolonged stays that include hiking, camping or similar outdoor activities in rural wooded regions of risk areas.' " Notably, the itinerary of the defendant, The Hotchkiss School, did not include any prolonged activities in such environments. At Mt. Pan, the students followed a paved path up the mountain, and they were to have come down in a cable car. Jean Yu, the defendant's faculty trip leader, testified that she permitted the plaintiff and a few other students to walk back down the mountain only after they had promised to remain on that same paved path. To conclude that the plaintiff's injuries were foreseeable, then, one would have to find, among many other things, that it was likely that students would seek and receive permission to walk back down the mountain, disobey safety instructions, leave the pathway, and bushwack their way to the bottom.[4] Such an inference

[4] It is true that liability for negligence may lie when "harm of the general nature as that which occurred is foreseeable . . . even though the manner in which the accident happens is unusual, bizarre or unforeseeable." *Pisel* v. *Stamford Hospital*, 180 Conn. 314, 333, 430 A.2d 1 (1980). Nevertheless, if the Mt. Pan trip itinerary only anticipated and only permitted walking on paved paths and travelling by cable car, activities that would have posed no risk of insect-borne disease, then harm of the general sort that the plaintiff suffered was foreseeable to the defendant only if it was likely that students would engage in a sylvan frolic of their own.

is precluded by our conclusion in *Goldberger* v. *David Roberts Corp.*, supra, 139 Conn. 632–33, that a counselor could not, as a matter of law, be expected to foresee that a thirteen year old camper would ignore safety instructions while outside adult supervision, resulting in unlikely injuries.

Even in areas in which TBE is endemic, the vast majority of ticks do not carry the disease. If bitten by an infected tick, a person has just a 0.005 to 0.001 chance of contracting TBE. Among those infected, most do not suffer any neurological injury. In other words, the probability that one of the defendant's students, having requested permission to walk down Mt. Pan and promising to remain on the path, would disregard her teacher's warnings, leave the trail, become lost in the vegetation, get bitten by one of the rare infected ticks, contract the disease, and suffer permanent injury was infinitesimally low.

The statistic that I find most remarkable comes from plaintiff's exhibit 34, a publication of the Centers for Disease Control and Prevention (CDC), Morbidity and Mortality Weekly Report dated March 26, 2010, and entitled "Tick-Borne Encephalitis among U.S. Travelers to Europe and Asia—2000–2009." In that report, the CDC, having reviewed all laboratory records for the prior decade, concluded that only five United States travelers had contracted TBE while overseas and that the plaintiff was the first ever to have contracted the disease in China. On the basis of its research, the CDC—which the parties agree is the most authoritative source on such matters—reached the following conclusion: "For unvaccinated travelers to areas in which TBE is endemic, the estimated risk for TBE during . . . transmission season is approximately one case per 10,000 person months." *One case per 10,000 months*. In other words, if the plaintiff and ten thousand of her classmates spent the full month of July living in the semi-

rural area around Mt. Pan, only one of them would likely contract TBE. The plaintiff herself could have lived on Mt. Pan for more than one millennium before she would have been expected to catch the disease. She was there for just a few hours. By my calculations, she had less than a one in two million chance of contracting TBE during her brief field trip to Mt. Pan,[5] lower even than her chance of being struck and killed by a meteorite.[6] If that was foreseeable, then it is difficult to imagine any misfortune that would not be.[7]

It bears emphasizing in this respect that the only reason that it was even conceivably foreseeable that an American tourist would contract TBE while sightseeing at Mt. Pan was because TBE *may* have been identified as a risk on the CDC's China webpage. But see part II B 1 of this concurring opinion. There was no evidence or testimony at trial, however, indicating that the various miscellaneous diseases listed near the end of a CDC travel advisory page occur with any particular frequency, nor that a disease that the CDC identifies as present in a country or a region necessarily poses a risk *throughout* that country or region. China is a large country, with a landmass roughly the size of the United States. Thus, the fact that a disease such as TBE occurs somewhere in the northeastern quadrant of China does not mean that an affliction found near the Siberian border necessarily poses a risk in Beijing or Tianjin, any more than the Zika virus endemic to south Florida

[5] The CDC noted that the risk of contracting TBE varies according to the degree of unprotected exposure in forested areas, and also that most cases occur during the months of March and November.

[6] See B. Howard, "What Are the Odds a Meteorite Could Kill You?," National Geographic (February 9, 2016), available at http://news.nationalgeographic.com/2016/02/160209-meteorite-death-india-probability-odds (placing odds at one in 1.6 million) (last visited July 27, 2017).

[7] By way of comparison, the plaintiff's own travel medicine expert wrote that a tourist is not considered to be at risk when the risk of contracting a particular disease is one in one million.

threatens tourists visiting Kansas City or Saint Louis, which also are located in the southeastern quadrant of our country.

In this instance, the CDC itself actually quantified the risk involved, indicating that it was minuscule. There simply was no basis, then, on which a jury reasonably could have concluded that it was *likely* or *probable* that the plaintiff would contract TBE[8] at Mt. Pan, as our law requires before liability for negligence will lie.

B

In light of the abundant, authoritative, and uncontroverted evidence that TBE is an extremely rare disease, one that posed a negligible risk to the hundreds of thousands of foreign visitors to the Mt. Pan area as of 2007, the Court of Appeals reached the only reasonable conclusion: "no one could have expected that [the plaintiff] would contract TBE." *Munn* v. *Hotchkiss School*, supra, 795 F.3d 332. One would have thought that would have ended the inquiry, that the fact that *no one could have expected* a certain outcome would, almost by defi-

[8] It was no more likely that the plaintiff would fall victim to other harm of the general nature as that which she suffered. The evidence at trial suggested that contracting other serious insect-borne illnesses such as Japanese encephalitis during the field trip to Mt. Pan was highly improbable. There was undisputed evidence, for example, that no foreign tourist had contracted that disease in China during the previous decade, or ever in Tianjin, most likely because Japanese encephalitis is endemic only in rural pig and rice farming areas and is transmitted only at night. Indeed, the plaintiff's own travel medicine expert wrote that the average tourist is not at risk of contracting Japanese encephalitis in China.

Moreover, although there were a few brief references at trial to the presence of Lyme disease in China, the Court of Appeals appears to have accepted the defendant's argument that that disease is not a harm of the same general sort as TBE. I agree. Lyme disease is pervasive in Connecticut, and yet one need only visit the nearest park, playground, or sports field to see that wearing long pants and long sleeved shirts on a hot summer day is not the norm, however prudent such measures might be.

nition, render that outcome unforeseeable.[9] Indeed, I am not aware of a single case in any jurisdiction in which a risk that was as quantifiably improbable as this was deemed to be reasonably foreseeable.

But they say that on a clear judicial day you can foresee forever; *Thing* v. *La Chusa*, 48 Cal. 3d 644, 668, 771 P.2d 814, 257 Cal. Rptr. 865 (1989); and both the District Court and the Court of Appeals were able to persuade themselves that the plaintiff's injuries were sufficiently probable to sustain the jury's verdict. In declining to hold as a matter of law that the plaintiff's injuries were unforeseeable, those courts relied primarily on the facts that (1) the defendant had actual foreknowledge of the risk of TBE in northeast China; *Munn* v. *Hotchkiss School*, supra, 795 F.3d 330; and (2) a finding of foreseeability was not unreasonable in light of the relatively painless measures that could have been taken to protect the plaintiff.[10] *Munn* v. *Hotchkiss School*, 24 F. Supp. 3d 155, 179, 198 (D. Conn. 2014). I consider each theory in turn.

1

I first consider the primary theory on which the Court of Appeals relied, namely, that the defendant had actual

[9] Black's Law Dictionary (6th Ed. 1990), for example, defines foreseeability, among other things, as "[t]hat which is objectively reasonable to *expect*, not merely what might conceivably occur." (Emphasis added.)

[10] The federal courts also relied on the fact that various CDC advisories and other travel websites referenced a risk of TBE or Japanese encephalitis in China or East Asia. See *Munn* v. *Hotchkiss School*, supra, 795 F.3d 330; *Munn* v. *Hotchkiss School*, supra, 24 F. Supp. 3d 176–79. As I explain in part II A of this concurring opinion, however, just as a visitor to Cleveland need not take precautions against a disease such as the plague, which affects only a few individuals each year in the mountain west; see CDC, Morbidity and Mortality Weekly Report: Human Plague—United States, 2015 (Vol. 64, August 28, 2015), available at https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6433a6.htm (last visited July 27, 2017); the mere fact that a disease has occurred *somewhere* in China or Asia does not, in and of itself, make it likely that an American tourist will contract the disease during a visit to Mt. Pan.

foreknowledge that TBE and other serious insect-borne diseases posed a risk to students travelling to Mt. Pan. There is no evidence in the record that any employee of the defendant ever saw an authoritative government warning indicating that TBE was endemic to Tianjin or Mt. Pan. The only employee of the defendant who allegedly saw any CDC warning relating to the presence of TBE anywhere in China was international travel programs director David Thompson. At trial, Thompson initially testified that, at the time of the trip, he saw a warning on the CDC's China webpage indicating that TBE was present in northeast China. He immediately qualified this testimony, however, explaining that the CDC website carried such a warning *at the time of trial* but that he did not recall whether any references to TBE had been posted prior to the June, 2007 trip. Thompson also testified that, in any event, the CDC warning did not mention Tianjin and that he did not believe that Tianjin was encompassed by the CDC's definition of "Northeastern China," which he understood to cover only China's far northern border areas with Russia and Inner Mongolia.[11] Given his lack of recollection, he ultimately concluded that "it might be useful to see what it is that the CDC said at that time because—it's been so long, and I don't want to be inaccurate."

In response, the plaintiff's counsel showed Thompson defendant's exhibit 546, which was a version of the CDC's China webpage that had been archived on the Internet Archive's Wayback Machine. See generally http://archive.org/web/web.php (last visited July 27, 2017). The webpage, which had been archived in

[11] Mt. Pan is located approximately fifty miles due east of Beijing Capital International Airport. Accordingly, if the CDC travel warnings for northeast China encompassed the Mt. Pan area merely because Mt. Pan is located in the northeastern quadrant of the country, they also would cover the capital airport region and would apply to many international travelers to China.

December, 2007, indicated that it was created and last modified on August 1, 2007, nearly two months *after* the defendant's trip commenced and more than three months *after* Thompson and Yu provided students and their parents with a link to the CDC website and other health-related trip information. Confronted with this August, 2007 document stating that "[TBE] occurs in forested regions in northeastern China," and asked whether "that's something you knew at the time from reading the material," Thompson replied: "Yes, I believe I would have seen that." Thompson never expressly testified that he saw such a warning on the CDC website prior to the June, 2007 trip. He simply acknowledged that he *would have* seen it *at the time* that it was posted on the CDC website.

The fact that the CDC webpage was not created until August 1, 2007, precludes any possibility that Thompson reviewed that particular webpage at an earlier date. His tepid acknowledgement that he "would have seen" the August, 2007 report at some unspecified time, which followed repeated statements by Thompson that he did not recall whether he had seen any warnings about TBE prior to the trip, is the sole evidence of record to support the conclusion that any employee of the defendant saw a TBE warning on an authoritative government website prior to the trip. Moreover, it is undisputed that the April 13, 2007 version of the CDC Travelers' Health page covering East Asia, including China, did not identify TBE as a disease endemic to that region. Notably, that webpage did specifically identify various other diseases, such as avian influenza, malaria, and severe acute pulmonary syndrome, also known as SARS, as being present in China. One week later, on April 21, 2007, the defendant sent health information to trip participants and their families and referred them to the CDC website.

Still, the Court of Appeals was of the opinion that, "while the August 1, 2007 advisory postdates the trip, it is possible that a similar advisory was on the website before" the students embarked for China. *Munn* v. *Hotchkiss School*, supra, 795 F.3d 330. That is certainly one possibility, that sometime between April 13 and early June, 2007, the CDC suddenly changed its assessment of the risk of TBE in China, despite the fact that no foreign traveler had contracted the disease during that time. If that was the case, none of the plaintiff's travel health experts was able to explain what precipitated the new risk assessment at that time. A second possibility, of course, is that the CDC did not update its assessment until August 1, 2007, right after the plaintiff's blood had tested positive for TBE antibodies.

Although the evidence was not before the trial court, we now know that the latter, more plausible scenario is what actually happened. On direct appeal, the defendant asked the Court of Appeals to take judicial notice of the fact that the same database on which the August, 2007 CDC webpage was archived also contains a version of that webpage that was created on May 25, 2007, two weeks before the students left for China, and that remained active and was archived on June 25, 2007, two weeks after the trip commenced. See id.; see also https://web.archive.org/web/20070625010918/wwwn.cdc.gov/travel/destinationChina.aspx (last visited July 27, 2017). That webpage makes no mention of TBE as a risk in China. In reality, then, Thompson could not possibly have seen the warning contained in the August 1, 2007 webpage prior to the trip, because the version of the website that was accessible to the public before and during the trip did not contain any such warning.[12]

[12] In addition, there was testimony at trial that, in 2007, the CDC published a specific article on TBE that did not list China among those countries in which the disease was endemic.

The Court of Appeals denied the defendant's eleventh hour attempt to supplement the record with a copy of the May 25/June 25 webpage. See *Munn* v. *Hotchkiss School*, supra, 795 F.3d 330. The court did so despite the fact that the federal courts—both trial and appellate—routinely take judicial notice of CDC websites,[13] and also of the Internet Archive's Wayback Machine as reliable evidence of how a particular website appeared on a particular date.[14] In any event, in light of Thompson's clear hesitation to affirmatively testify that he had seen any reference to TBE in China prior to the trip, the Court of Appeal's speculation that there might possibly have been some reference to that effect on the CDC website seems a rather slim reed on which to hold the plaintiff's injuries foreseeable.

2

The District Court, in concluding that there was sufficient evidence to sustain a finding of foreseeability, also applied the Learned Hand formula, pursuant to which reasonable care is required only if the burden of adequate precautions is less than the gravity of an injury discounted by the probability that the injury will occur. See *United States* v. *Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). The District Court apparently was

[13] See, e.g., *United States* v. *Chester*, 628 F.3d 673, 692 n.4 (4th Cir. 2010); *Gent* v. *CUNA Mutual Ins. Society*, 611 F.3d 79, 84 n.5 (1st Cir. 2010); *Seddens* v. *McGinnis*, Docket No. 91-1500, 1992 WL 174541, *2 (7th Cir. 1992) (decision without published opinion, 972 F.2d 352 [7th Cir. 1992]); *Brown* v. *Federal Express Corp.*, 62 F. Supp. 3d 681, 683, 686–87 (W.D. Tenn. 2014), aff'd, 610 Fed. Appx. 498 (6th Cir. 2015).

[14] See, e.g., *Perera* v. *Attorney General*, 536 Fed. Appx. 240, 242 n.3 (3d Cir. 2013); *Distributorsoutlet.com, LLC* v. *Glasstree, Inc.*, Docket No. 11-CV-6079 (PKC) (SLT), 2016 WL 3248310, *2 (E.D.N.Y. June 10, 2016); *Erickson* v. *Nebraska Machinery Co.*, Docket No. 15-CV-01147-JD, 2015 WL 4089849, *1 n.1 (N.D. Cal. July 6, 2015); *Pond Guy, Inc.* v. *Aquascape Designs, Inc.*, Docket No. 13-13229, 2014 WL 2863871, *4 (E.D. Mich. June 24, 2014).

of the view that, notwithstanding the remote probability of a tourist contracting TBE or other serious insect-borne disease at Mt. Pan, the defendant was obliged to take precautionary measures because (1) the potential consequences of diseases such as TBE are severe, and (2) the burdens of prevention—warning or requiring students to wear long sleeved shirts and long pants, apply insect repellants containing diethyltoluamide (DEET), and perform periodic tick checks—appear "minimal." *Munn* v. *Hotchkiss School*, supra, 24 F. Supp. 3d 198.

It is not clear to me that Connecticut has embraced the law and economics definition of foreseeable harm as expressed in the Learned Hand formula.[15] As I have explained, our cases consistently have defined a foreseeable harm simply as one that is likely to occur or that reasonably can be anticipated, without any reference to the burdens of prevention or the magnitude of the risk involved. Even if we were to assume that those considerations are relevant to the foreseeability question,[16] however, I do not agree that they were sufficient to overcome the infinitesimally low probability that one of the defendant's students would contract TBE at Mt. Pan.

a

Turning first to the magnitude of the risk prong of the equation, no one disputes that TBE is a potentially serious disease. Although many cases are entirely asymptomatic, and many others result in a full recovery, for individuals like the plaintiff, who are unlucky enough to contract a serious case, the long-term effects are devastating. But the reality is that if a student had merely stubbed her toe while walking down Mt. Pan,

[15] The District Court did not cite to any Connecticut authority suggesting that we have.

[16] Of course, those considerations may be relevant to the distinct question of whether a breach of duty has occurred.

we would not be having this conversation. Most of the risks about which travelers worry—and sue—when visiting exotic, foreign destinations are ones that carry potentially serious, if not fatal, consequences. These risks run the gamut from tropical diseases to medical emergencies, food poisoning, street crime, terrorism, civil unrest, transportation accidents, extreme weather events, animal attacks, and random imprisonment. The list of remote but serious risks is, literally, endless.

Consider just a few of the freak accidents, illnesses, and injuries that might befall a visitor to China. In recent years, tourists to China have been mauled to death by zoo tigers,[17] caught up in airport riots,[18] murdered by Uighur terrorists,[19] robbed in bars,[20] injured under collapsing bridges,[21] and killed in various ways at scenic lookout points.[22] Chinese authorities have imprisoned

[17] See RT News, "Tourist Mauled to Death in Brutal Hour-Long Tiger Attack in Chinese Zoo" (January 29, 2017), available at https://www.rt.com/viral/375513-tiger-killing-china-zoo (last visited July 27, 2017).

[18] See T. Phillips, "Chinese Passengers Start Riot in Airport over Delayed Flights," The Telegraph (February 7, 2014), available at http://www.telegraph.co.uk/news/worldnews/asia/china/10623528/Chinese-passengers-start-riot-in-airport-over-delayed-flights.html (last visited July 27, 2017).

[19] See A. Krishnan, "Tiananmen Attack a 'Jihadi Operation': Islamist Group," TheHindu.com (May 28, 2016), available at http://www.thehindu.com/news/international/world/tiananmen-attack-a-jihadi-operation-islamist-group/article5386937.ece (last visited July 27, 2017).

[20] See Z. Tingting, "University Graduate Robs Foreigners in Beijing Bars," China.org.cn (November 4, 2013), available at http://china.org.cn/china/2013-11/04/content 30492897.htm (last visited July 27, 2017).

[21] See R. Pocklington, "Shocking Video and Pictures Show Tourists Plunge into Water as New Bridge Collapses," Mirror (October 14, 2013), available at http://www.mirror.co.uk/news/world-news/chinese-bridge-collapse-video-pictures-2369243 (last visited July 27, 2017).

[22] See C. Bodeen, "China: 1 Tourist Killed, 18 Hurt by Falling Rocks," San Diego Union-Tribune (July 21, 2013), available at http://www.sandiegouniontribune.com/sdut-china-1-tourist-killed-18-hurt-by-falling-rocks-2013jul21-story.html (last visited July 27, 2017); L. Qian, "Tourist Falls to Death after Posing at Cliff," ShanghaiDaily.com (August 28, 2013), available at http://www.shanghaidaily.com/nation/Tourist-falls-to-death-after-posing-at-cliff/shdaily.shtml (last visited July 27, 2017).

tourists for using their cellphones on airplane mode[23] and for watching a British Broadcasting Corporation documentary.[24] A visitor to the country could fall victim to a novel strain of avian flu[25] or to an ancient affliction such as the bubonic plague.[26] They could be poisoned by street food[27] or contaminated sashimi;[28] knocked off the Great Wall of China[29] or stoned by Buddhist monks.[30] In bus accidents alone, foreign travelers have been injured or killed when their tour buses burst into

[23] See C. Custer, "Tourist in China Detained for 5 Days after Using Mobile Phone on Airplane," TechInAsia (October 17, 2012), available at https://www.techinasia.com/tourist-china-detained-5-days-mobile-phone-airplane (last visited July 27, 2017).

[24] See A. Laing & J. Ensor, "Elderly British Tourists Detained in China Were Arrested for 'Watching BBC Documentary,' " The Telegraph (July 18, 2015), available at http://www.telegraph.co.uk/news/worldnews/asia/china/11746637/China-to-deport-foreign-tourists-after-terror-video-case.html (last visited July 27, 2017).

[25] See L. Abrams, "New Bird Flu Claims Its First Victim," Salon.com (December 18, 2013), available at http://www.salon.com/2013/12/18/new_bird_flu_claims_its_first_victim (last visited July 27, 2017).

[26] See J. Kaiman, "In China, a Single Plague Death Means an Entire City Quarantined," TheGuardian.com (July 25, 2014), available at https://www.theguardian.com/cities/2014/jul/25/plague-death-china-quarantine-yumen-city (last visited July 27, 2017).

[27] See E. Crouch, "Beijing Street Meat Poisons Tourist, Definitely Wasn't Lamb," Shanghaiist (July 23, 2013), available at http://shanghaiist.com/2013/07/23/beijing_street_meat_poisons_tourist.php (last visited July 27, 2017).

[28] See A. Hodgekiss, "Sushi Lover's Entire Body Left Riddled with WORMS after Eating Contaminated Sashimi," DailyMail.com (September 24, 2014), available at http://www.dailymail.co.uk/health/article-2768117/Sushi-lover-s-entire-body-left-riddled-tapeworm-parasites-eating-contaminated-sashimi.html (last visited July 27, 2017).

[29] See C. Kitching, "Chinese Woman Dies after Being Accidentally Knocked over by Canadian Tourist at Great Wall of China," DailyMail.com (April 12, 2015), available at http://www.dailymail.co.uk/travel/travel_news/article-3035644/Chinese-woman-dies-accidentally-knocked-Canadian-tourist-Great-Wall-China.htm (last visited July 27, 2017).

[30] See "Monks Beat Tourist with Stones and Hammers," CRI (August 7, 2013), available at http://www.china.org.cn/china/2013-08/07/content_29644989.htm (last visited July 27, 2017).

flames,[31] plummeted into a valley,[32] fell off a cliff,[33] or were buffeted by falling rocks during an earthquake.[34]

If a school such as the defendant is required to not only warn students about the risk of a disease as rare as TBE but also to protect them from such a risk while travelling abroad, then it must take comparable precautions with respect to all of the other singular risks that attend foreign travel. As the Court of Appeals recognized in certifying the duty question to this court, "this case is likely to have repercussions beyond this particular fact pattern as it implicates broad questions of Connecticut public policy." *Munn* v. *Hotchkiss School*, supra, 795 F.3d 334.

The defendant's staff could have spent many pages and many hours warning their students about and preparing them against these and numerous other serious but undeniably remote risks, not to mention the myriad of more mundane dangers that confront visitors to China—everything from air pollution and motor vehicle accidents to sunburn and sexually transmitted diseases. It is difficult to know how the risk of a rare tick-borne illness would have rated in this parade of horribles, but one suspects that the typical teenager would have paid it less mind than some of the more outlandish dangers.

[31] See "China Highway Tourist Bus Fire Kills Six in Tianjin," BBC (October 1, 2012), available at http://www.bbc.com/news/world-asia-china-19782466 (last visited July 27, 2017); see also S. Yingying, "Extreme Heat Causing Vehicle Fires," ChinaDaily USA (July 17, 2013), available at http://usa.chinadaily.com.cn/epaper/2013-07/17/content_16787740.htm (discussing spontaneous combustion of sightseeing bus) (last visited July 27, 2017).

[32] See "Yunnan Bus Crash Kills 8," Global Times (July 15, 2013), available at http://www.globaltimes.cn/content/796078.shtml (last visited July 27, 2017).

[33] See "Tourist Bus Falls from Cliff in China, 3 Killed," Zee News (April 29, 2013), available at http://zeenews.india.com/news/world/tourist-bus-falls-from-cliff-in-china-3-killed_845542.html (last visited July 27, 2017).

[34] See "Seven Tourists Injured, 300 Evacuated in Yunnan, China Earthquake," HTH Worldwide (September 3, 2013), available at https://www.hthstudents.com/extras/haiti_article_template.cfm?p_fn=ne_news_108576.html (last visited July 27, 2017).

As the amici wisely caution, "[e]ven if educators could warn of and guard against every such risk, the information overload would leave students and parents in a maze of warnings . . . . [Such a requirement] would have the . . . negative effect of . . . burying warnings about imminent risks among a litany of other warnings . . . ." Indeed, requiring that trip planners lecture teen travelers about every possible foreseeable risk would likely have the unintended consequence of *jeopardizing* student safety by diverting their attention from the more credible risks.

Even under an economics based approach, then, it makes no sense to require that a school warn and prepare its students against each and every remote but potentially serious risk that awaits international travelers. The task would be as hopeless as it would be self-defeating. This court has recognized as much in the closely related context of medical informed consent, wherein a physician need not disclose to patients every remote risk potentially associated with a medical procedure but only those deemed sufficiently likely as to be material. See *Pedersen* v. *Vahidy*, 209 Conn. 510, 517–23, 552 A.2d 419 (1989). Put differently, the Learned Hand formula may make sense in the context of determining whether reasonable care requires the adoption of an *individual* precautionary measure. We must be wary, however, in cases such as this that sound in informed consent, lest the need to warn and protect participants against each individual remote but potentially serious outcome has the aggregate effect of inuring us to more substantial risks or discouraging participation in generally safe and wholesome activities.

b

I turn next to the other side of the Learned Hand equation, the question of whether the protective mea-

sures necessary to prevent students from contracting TBE were truly minimal and unobtrusive. One challenge in addressing this question is that the jury, in finding that the defendant failed to protect the plaintiff, did not specify what protective measure or measures the defendant should have adopted. The District Court, in upholding the verdict, speculated that merely "provid[ing] students with simple, accurate advice about the risk of insect-borne disease and then a quick, gentle reminder to apply bug spray before hiking" might have been sufficient to satisfy the defendant's duty to the plaintiff. *Munn* v. *Hotchkiss School*, supra, 24 F. Supp. 3d 198 n.24. The truth, however, is that, throughout the trial, the plaintiff's counsel repeatedly reminded the jury that the defendant does not allow its male students to attend class without jackets and ties and that teachers send students back to their rooms if they show up to the school's annual Eco Day wearing inappropriate footwear. In the same breath, counsel told the jury that the defendant had a responsibility "*to be sure* [students] wear the right type of clothing, *to be sure* that they use . . . effective repellent, *to be sure* that they stay out of the woods without using these precautions . . . . These are not difficult precautions to *enforce*." (Emphasis added.) The plaintiff's counsel also emphasized how governmental agencies *mandate* that their employees use insect disease precautions in the field. Thus, while one can always speculate, the most reasonable reading of the verdict, in light of how the plaintiff argued the case, is that the jury found that the defendant's employees were negligent in not *forcing* the students to (1) wear long pants and long sleeved shirts, apply DEET, and conduct tick checks, or (2) remain on the bus if they refused. This conclusion is bolstered by the fact that one of the plaintiff's witnesses, another student who attended the trip, testified that the defendant's teachers not only instructed the students to bring insect

repellant on the trip but also repeatedly reminded them to use it while in China. So that clearly was not enough.

Of course, in retrospect, any parent, familiar with the facts of the present case and the terrible injuries that the plaintiff has sustained, would think it a small price to pay to make their child use insecticide and wear protective clothing. If I thought it at all likely that my child would suffer such a fate, then no protective measure would be too onerous. But the relevant question is whether a reasonable school or parent, ex ante, knowing that the chance of contracting TBE was less than one in two million and the chance of suffering permanent damage lower still, would have required high school students to take such precautions. I would not.

There was undisputed testimony that it was uncomfortably hot when the students visited Mt. Pan in the late morning or early afternoon of June 23, 2007, and recorded weather data confirm that temperatures in the region approached 90 degrees Fahrenheit on that day.[35] It is difficult enough to get teenagers to wear long pants and long sleeved shirts in March or November, let alone in the heat of the summer. To force them to swap out their shorts and tank tops for jeans and turtlenecks, merely to protect against diseases that were virtually unknown at Mt. Pan and that no tourist had ever contracted, strikes me as both unreasonable and unrealistic. Surely the risk that a student would

[35] On June 23, 2007, the high temperature was 90 degrees in Beijing and 89 degrees in Tianjin. See https://www.wunderground.com/history/airport/ZBAA/2007/6/23/DailyHistory.html?req_city=&req_state=&req_statename=&reqdb.zip=&reqdb.magic=&reqdb.wmo= (last visited July 27, 2017); https://www.wunderground.com/history/airport/ZBTJ/2007/6/23/DailyHistory.html?req_city=Tianjin&req_state=&req_statename=China&reqdb.zip=&reqdb.magic=&reqdb.wmo= (last visited July 27, 2017); see also *Gaston* v. *Coughlin*, 249 F.3d 156, 165 (2d Cir. 2001) (appellate court may take judicial notice of historical temperature data); *Hadley* v. *Peters*, Docket No. 94-1267, 1995 WL 675990, *8 (7th Cir. 1995) (decision without published opinion, 70 F.3d 117 [7th Cir. 1995]) (same).

have suffered dehydration, hyperthermia, or heat exhaustion from climbing a mountain in fall clothing on a 90 degree June day was a far more pressing concern.

What about the bug spray? It is true that DEET is deemed by the federal government to be safe for human use.[36] As discussed at trial, however, not all parents are comfortable with putting such a strong chemical insecticide on their children, at least when not absolutely necessary, and many families decline to use DEET even in areas in which serious insect-borne illnesses are pervasive. Indeed, there was uncontested expert testimony at trial that even United States Marines serving in tropical environments who are under direct orders to apply DEET routinely refuse to do so and risk malaria rather than subject themselves to such a "major intervention."

Nor can we consider these costs in a vacuum. The jury verdict in this case, as affirmed by the District Court and the Court of Appeals, stands for the proposition that a school has a duty to warn and protect its students against *any* remotely foreseeable harm that might befall them while travelling abroad or, at least, any remotely foreseeable serious risk, the existence of which may be readily and reliably determined. As I have explained, the range of such risks is virtually limitless. So too are the protective measures that might be taken to shield children from all those threats.

As evidenced by the literature that the defendant's trip chaperones provided to the students and their families, simply protecting students from the most common risks faced by overseas travelers requires constant vigi-

[36] See United States Environmental Protection Agency, "Safety Review of DEET," available at https://www.epa.gov/insect-repellents/deet (last visited July 27, 2017); see also "Reregistration Eligibility Decision (RED): DEET," EPA738-R-98-010 (September 1998), p. 6; Environmental Protection Agency, "DEET (N,N-Diethyl-meta-toluamide) Interim Registration Review Decision Case Number 0002," EPA-HQ-OPP-2012-0162 (September 2014), p. 9.

lance toward a broad range of threats. Students travelling to China were cautioned, among many other things, to: keep a low profile; never leave their possessions unattended; report unattended bags to the police; never agree to carry a package for anyone; carry emergency phone numbers, extra cash, health insurance information, and a separate copy of identification documents; not carry too much cash or too many credit cards; avoid dangerous areas, short cuts, narrow alleys, and poorly lit streets; try not to be out on the streets alone at night; ignore negative comments and pick-up lines; beware con artists, pickpockets, and beggars; be especially cautious at train stations, shopping areas, and public transportation; be wary while making phone calls; abstain from intimate sexual contact; carry one's own supply of spermicidal latex condoms in a cool, dry place; be wary of foreigners who trade on stereotypes of American sexual values; remember that blood transfusions may carry a risk of HIV infection; prepare for temperature changes and rain; be mindful of feelings of homesickness, boredom, fatigue, physical discomfort, depression, helplessness, and hostility to the host culture; dress respectably and appropriately; and try to maintain a healthy mind and body.

Then consider all of the various remote risks for which special precautions could be taken. The defendant might have asked the students to wear bee masks on Mt. Pan, given the serious threat posed by giant killer bees in parts of northern China.[37] Teachers could have roped students together like mountain climbers atop the Great Wall to prevent a fatal fall, or made them take all their meals at the Tianjin McDonald's, lest they be sickened by the local cuisine.

[37] See C. Pleasance, "China Goes to War with the Killer Giant Hornets That Have Claimed 42 Lives Already," DailyMail.com (October 8, 2013), available at http://www.dailymail.co.uk/news/article-2449483/China-goes-war-killer-giant-hornets-killed-42.html (last visited July 27, 2017).

Returning to the point I made before, none of those safety measures, standing alone, is especially oppressive relative to the serious risk of injury or death that it might prevent. Taken together, however, all of the minor protective measures that a school might impose in order to shield students from the plethora of remote risks that one confronts when travelling abroad *would* be oppressive. If my children were travelling to the hypothetical malaria-ridden swamp to which the parties referred throughout trial, then of course I would want them to take the appropriate prophylactic measures, regardless of side effects and regardless of inconvenience. But I would not expect them to visit major tourist attractions on a hot summer day covered in chemical sprays and cocooned in all manner of protective clothing, merely to ward off perils that might impact a few extremely unlucky individuals each year in a country of more than one billion people.

C

Finally, if we are going to weigh the economic costs and benefits associated with preventative measures, then we also must take into account the fruits that flow from letting adolescents engage in activities that have not been completely sanitized of risk. Study abroad and outdoor activities such as hiking are attractive and beneficial precisely because they are attended by certain risks, and challenge participants in certain ways, beyond what students normally confront in the controlled school environment. See K. Burch, "Going Global: Managing Liability in International Externship Programs—A Case Study," 36 J.C. & U.L. 455, 495 (2010). In this case, for instance, part of the defendant's curriculum was to encourage groups of students to venture into Tianjin without adult supervision, forcing them to use their emergent Chinese language skills to find the restaurant where the group was to dine that evening. If schools are forced to sterilize such activities

to the point that even the most remote risks have been eliminated, then we will deprive our youth of much of the opportunity for independence, experiential learning, and personal growth that comes from surmounting such challenges—not to mention taking all the fun out of them. As one legal scholar has explained, "[t]he objective of focusing on safety concerns related to study abroad is not to offer a risk-free foreign experience. That goal is no more desirable than the idea that car manufacturers should produce risk-free vehicles so crash-worthy and slow that no one could ever be harmed in an auto-accident and no suit ever filed. Education inevitably entails risks, particularly when it takes place in another country. Exposing students to some of those risks is part of the educational process. . . . American program providers should not operate supercautious foreign programs . . . ." (Footnotes omitted.) V. Johnson, "Americans Abroad: International Educational Programs and Tort Liability," 32 J.C. & U.L. 309, 315–16 (2006).

Of course, as parents, we would love to be able to put our children into all sorts of challenging, character building situations, yet have them always walk away successful and unscathed. But life is not a Disney movie, and that is not a realistic expectation. As both this court and others frequently have observed, it would be unwise, if not impossible, to impose such a duty on schools and related entities. See *Goldberger* v. *David Roberts Corp.*, supra, 139 Conn. 631–32; see also *Gustin* v. *Assn. of Camps Farthest Out, Inc.*, 267 App. Div. 2d 1001, 1003, 700 N.Y.S.2d 327 (1999) ("[i]n such a setting, constant supervision is neither feasible nor desirable because [o]ne of the benefits of such an institution is to inculcate self-reliance in the [participants] which an overly protective supervision would destroy" [internal quotation marks omitted]).

C

In light of these considerations, it is no surprise that courts in other jurisdictions, considering claims arising from improbable injuries sustained on school trips, have not hesitated to hold such risks unforeseeable as a matter of law. See, e.g., *Mancha* v. *Field Museum of Natural History*, 5 Ill. App. 3d 699, 701, 283 N.E.2d 899 (1972) (affirming dismissal of action because "[i]t cannot be said that an assault on a [twelve year old] boy in the Field Museum is an occurrence which a reasonable man would anticipate"); *David* v. *New York*, 40 App. Div. 3d 572, 573, 835 N.Y.S.2d 377 (2007) (directing judgment dismissing complaint arising from unprecedented injury during hay ride). I would encourage the Court of Appeals to reach this same conclusion.

Barring that, I hope that our legislature will follow the example of California[38] and confer full or partial statutory immunity[39] from suit on study abroad and related programs, in furtherance of Connecticut's well established policy of promoting and expanding international education and foreign study programs. See General Statutes § 10-27. There is a reason why more than thirty organizations and associations representing in excess of 20,000 colleges, universities, graduate programs, private secondary schools, public boards of education, international education and exchange programs, camps, and outdoor experience programs all have

[38] See Cal. Educ. Code § 35330 (d) (Deering 1995); see also *Sanchez* v. *San Diego County Office of Education*, 182 Cal. App. 4th 1580, 1584, 106 Cal. Rptr. 3d 750 (2010).

[39] For example, the legislature may wish to codify a version of the rule that the District Court adopted in *Mercier* v. *Greenwich Academy, Inc.*, Docket No. 3:13-CV-4 (JCH), 2013 WL 3874511, *5 (D. Conn. July 25, 2013), which held that a coach and school are liable only for reckless or intentional conduct resulting in player injury during a high school athletic contest. This may be an appropriate standard for situations in which imposition of a negligence standard risks sterilizing the activity and stripping it of its primary value or purpose.

appeared as amici curiae in this case, in support of the defendant's position. These organizations recognize that this case invariably will come to stand for the proposition that foreign study—and perhaps all extracurricular—programs must not only warn of, but also affirmatively protect participants from, even the most remote risks and dangers. Such an outcome will adversely impact the ability of these programs to provide these tremendous opportunities in Connecticut, "radically and negatively impacting the number and type of international student experiences schools will continue to offer their students." As the Court of Appeals recognized, "[i]f the award stands, it would set an important precedent for negligence cases arising from educational trips. . . . This case is likely to encourage future victims of unusual accidents on educational trips to seek compensation, placing a heavy financial burden on trip providers." (Citation omitted.) *Munn* v. *Hotchkiss School*, supra, 795 F.3d 333. Even the District Court, which generally rejected the defendant's public policy arguments, conceded that "some schools may cancel programs" as a result of the verdict in this case. *Munn* v. *Hotchkiss School*, supra, 24 F. Supp. 3d 198. I fear that the impact will be especially harsh on our less privileged students and those who attend underfunded public schools.

I understand that other juries in other cases may not be as willing to find that other extremely improbable tragedies are foreseeable. But surely the unprecedented verdict in this case will attract the attention of potential plaintiffs who have suffered unlikely injuries while abroad. And surely the fact that the Court of Appeals has held such an "undeniably remote" injury to be foreseeable; *Munn* v. *Hotchkiss School*, supra, 795 F.3d 332; will place additional pressure on future defendants to settle such claims, regardless of their merits.

In short, other schools and programs will not have the luxury of ignoring equally remote risks, in the hope that other juries might be less generous or that other courts might draw firmer limits on foreseeability. Providers will have to conduct their affairs, plan their itineraries, and insure themselves as if they are strictly liable for any and all remote risks that might come to pass. Students will be the worse for it. We conduct our affairs in the shadow of the law, and this case casts a long shadow indeed.

IN RE ELIANAH T.-T. ET AL.*
(SC 19902)

Rogers, C. J., and Palmer, Eveleigh, McDonald, Espinosa, Robinson and Vertefeuille, Js.**

Syllabus

Pursuant to statute (§ 17a-10 [c]), the Commissioner of Children and Families may authorize, on the advice of a licensed physician, "medical treatment, including surgery, to insure the continued good health or life" of a child committed to his or her custody.

The respondent parents appealed from the decision of the trial court granting the petitioner, the Commissioner of Children and Families, permission to vaccinate their minor children. The children had been removed from the respondents' custody after a social worker employed by the Department of Children and Families discovered the children covered in bruises and in a generally poor state of hygiene. The trial court subsequently rendered judgments adjudicating the children neglected and, with the consent of the parties, committed the children to the temporary custody of the commissioner. At that time, the respondents made a motion seeking to prevent, on the basis of certain religious beliefs, the commissioner from authorizing vaccinations for the children pursuant to § 17a-10 (c) in accordance with the department's usual practice. The trial court denied the respondents' motion and granted the commissioner

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

** The listing of judges reflects their seniority status on this court as of the date of oral argument.

permission to vaccinate the children, concluding that, because the commissioner had custody of and control over the children, she had the authority and obligation to vaccinate the children pursuant to § 17a-10 (c) notwithstanding the respondents' religious objection. On the respondents' subsequent appeal, *held* that the trial court improperly granted the commissioner permission to vaccinate the children in light of the respondents' religious objection, this court having concluded that vaccinations do not constitute medical treatment under § 17a-10 (c) and that, therefore, the commissioner is not authorized to vaccinate children committed to her temporary custody without parental consent; although the apparent conflict between the ordinary meaning of the phrase "medical treatment," which contemplates curing an existing condition, and the phrase "insure the continued good health or life of the child," which may reasonably be read to permit preventative care, created ambiguity in § 17a-10 (c) with respect to vaccinations, which are prophylactic in nature, the modification of the phrase "medical treatment" by the phrase "including surgery," the existence of related statutes explicitly authorizing preventative measures in other contexts, and an examination of relevant portions of legislative history supported the conclusion that the legislature intended to grant the commissioner only limited authority to provide medical treatment without parental consent in emergency situations.

(*Two justices concurring separately in one opinion*)

Argued May 4—officially released August 15, 2017***

Procedural History

Petitions by the Commissioner of Children and Families to adjudicate the respondents' minor children neglected, brought to the Superior Court in the judicial district of New Britain, Juvenile Matters, where the respondents entered pleas of nolo contendere as to the neglect allegations; thereafter, the court, *Abery-Wetstone*, *J.*, issued an order adjudicating the minor children neglected and transferring temporary custody of the minor children to the Commissioner of Children and Families; subsequently, the court, *Abery-Wetstone*, *J.*, denied the respondents' motion seeking to prevent the Commissioner of Children and Families from vaccinating the minor children, from which the respondents appealed. *Reversed; judgment directed.*

*** August 15, 2017, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Benjamin M. Wattenmaker, with whom was *Joshua Michtom*, for the appellants (respondents).

Rosemarie T. Weber, assistant attorney general, with whom were *Evan O'Roark*, assistant attorney general, and, on the brief, *George Jepsen*, attorney general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

Opinion

ROBINSON, J. The dispositive issue in this appeal is whether General Statutes § 17a-10 (c)[1] authorizes the petitioner, the Commissioner of Children and Families (commissioner), to vaccinate a child placed temporarily in her custody, over the objection of that child's parents. The respondents, Giordan T. and Nicanol T., appeal[2] from the decision of the trial court denying their motion seeking to prevent vaccination of their minor children, Elianah T.-T. and Nathaniel T.-T. On appeal, the respondents claim, inter alia, that § 17a-10 (c) does not authorize the commissioner to vaccinate the children over the respondents' objection because vaccinations do not

[1] General Statutes § 17a-10 (c) provides: "When deemed in the best interests of a child in the custody of the commissioner, the commissioner, the commissioner's designee, a superintendent or assistant superintendent or, when the child is in transit between department facilities, a designee of the commissioner, may authorize, on the advice of a physician licensed to practice in the state, medical treatment, including surgery, to insure the continued good health or life of the child. Any of said persons may, when he or she deems it in the best interests of the child, authorize, on the advice of a dentist licensed to practice in the state, dentistry, including dental surgery, to insure the continued good health of the child. Upon such authorization, the commissioner shall exercise due diligence to inform the parents or guardian prior to taking such action, and in all cases shall send notice to the parents or guardian by letter to their last-known address informing them of the actions taken, of their necessity and of the outcome, but in a case where the commissioner fails to notify, such failure will not affect the validity of the authorization."

[2] The respondents appealed from the decision of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

constitute "medical treatment" within the meaning of that statute.[3] We agree with this claim and conclude that vaccinations are not "medical treatment" as contemplated by § 17a-10 (c). Accordingly, we reverse the decision of the trial court.

The record reveals the following undisputed facts and procedural history. The Department of Children and Families (department) first became involved with the respondents' family on April 21, 2016, after the Rocky Hill Police Department was called to investigate a physical altercation between the respondents. The department learned from police that the respondents and the children, who were one and two years old at the time, had been living out of a minivan for several months as they moved from Florida to Connecticut, making stops in North Carolina, Colorado, and New York. The police subsequently arrested both respondents for disorderly conduct. Following the respondents' arrest, a social worker from the department met with the children at the police station and observed that they smelled of urine, were filthy, and were covered with multiple bruises. The department then invoked a ninety-six hour hold over the children pursuant to General Statutes § 17a-101g (e). The respondent mother gave the department permission to have the children medically evaluated.[4]

Thereafter, on April 25, 2016, the commissioner filed neglect petitions as to both of the children and sought

[3] The respondents also raise several constitutional claims. Specifically, they argue that, as applied, § 17a-10 (c) violates (1) their fundamental liberty interest in directing the care and religious education of the children, and (2) their right to procedural due process. Because we resolve this appeal on statutory grounds, we do not address these claims. See, e.g., *State* v. *Brown*, 309 Conn. 469, 478–79 n.11, 72 A.3d 48 (2013) ("[i]t is well established that this court has a basic judicial duty to avoid deciding a constitutional issue if a nonconstitutional ground exists that will dispose of the case" [internal quotation marks omitted]).

[4] Medical tests revealed that both of the children have Von Willebrand's Disease, a genetic blood disorder that may have caused their bruising.

ex parte orders of temporary custody. On April 29, 2016, the trial court sustained the orders of temporary custody and ordered specific steps to facilitate reunification of the children with the respondents pursuant to General Statutes § 46b-129. At a hearing held on August 23, 2016, the respondents entered pleas of nolo contendere as to the neglect allegations and agreed to commit the children temporarily to the care and custody of the commissioner. The trial court entered findings of neglect, rendered judgments on the petitions in accordance with the respondents' pleas, and committed the children to the custody of the commissioner. At that hearing, the parties advised the court that the respondents, on the basis of their sincerely held religious beliefs, objected to vaccination of the children for common childhood diseases in accordance with the department's usual practice. The respondents then made an oral motion seeking to prevent vaccination, to which the commissioner objected.

On November 17, 2016, the trial court held a one day hearing to determine whether the commissioner had the authority to vaccinate the children in light of the respondents' religious objection. During the hearing, the commissioner presented four witnesses: (1) Iris Thompson, a nurse consultant employed by the department; (2) Stephen Humphrey, a clinical psychologist who had conducted a court ordered evaluation of the respondents; (3) Fredericka Wolman, a pediatrician employed as the department's director of pediatrics; and (4) Jessica Nordlund, a department social worker. Thompson and Humphrey testified that they had communicated with the respondents regarding the immunizations and that the respondents never expressed a religious objection. Wolman testified about the medical importance of immunizations, and Nordlund testified that she had to call numerous physicians before locating one who would treat unvaccinated children. In

response, the respondent mother testified about her religious beliefs.

On January 13, 2017, the trial court issued a memorandum of decision denying the respondents' motion and granting the commissioner permission to vaccinate the children. The trial court stated that it "need not reach the issue of [the respondent] mother's religious belief, because the children are committed to the [custody of the commissioner]." The trial court similarly determined that the exemption provided by General Statutes § 10-204a to the state's vaccination requirement for school children, for religious objections to immunization, did not apply in this case because the children were committed to the care and custody of the commissioner. The court concluded that the crucial issue in this case was the fact that the commissioner had custody of and control over the children, which gave the commissioner "the authority and obligation to vaccinate" them pursuant to § 17a-10 (c). This appeal followed.[5] See footnote 2 of this opinion.

On appeal, the respondents claim, inter alia, that § 17a-10 (c) does not authorize the commissioner to vaccinate the children over the respondents' objection because vaccinations are not "medical treatment" as contemplated by the statute. The respondents contend that the plain language of § 17a-10 (c) indicates that preventative vaccinations are not "medical treatment" because "treatment" is defined as the steps taken to cure an injury or disease. Thus, the respondents argue

[5] The trial court stayed execution of its decision until February 22, 2017, the date on which the respondents appealed. The parties disagree about whether the filing of the present appeal triggered an automatic stay pursuant to Practice Book § 61-11. We agree with the commissioner's argument that an automatic stay did not arise from this appeal because § 61-11 (b) specifically excludes juvenile matters, such as the present case, brought pursuant to chapter 33a of our rules of practice. Nevertheless, on May 1, 2017, this court, sua sponte, ordered a stay of the trial court's decision pending resolution of the present appeal. See Practice Book § 60-2.

that the commissioner may authorize "medical treatment" without parental consent only to address an *existing* injury, illness, or disease. Because the commissioner did not seek to vaccinate the children to cure an existing illness or disease, but rather as a precautionary measure, the respondents contend that such vaccinations do not fall within the plain language of the statute. Alternatively, the respondents contend that, even if the court deems the phrase "medical treatment" ambiguous, the legislative history of § 17a-10 (c) establishes that the legislature intended the statute to give the commissioner only limited authority to provide medical treatment without parental consent in emergency situations.

In response, the commissioner contends that "[t]he plain language of § 17a-10 (c), very simply, gives the commissioner the authority to provide medical treatment to children in its care, consistent with the child's best interests." In the commissioner's view, § 17a-10 (c) is plain and unambiguous, and the phrase "medical treatment" is commonly understood to include the "mitigat[ion]" of an illness or disease. Accordingly, the commissioner contends that vaccinations are "medical treatment" because they are a medicine administered by a physician to mitigate against diseases. We, however, agree with the respondents and conclude that vaccinations do not constitute "medical treatment" under § 17a-10 (c).

The issue of whether § 17a-10 (c) authorizes the commissioner to vaccinate children committed to her temporary custody over parental objection presents a question of statutory construction over which we exercise plenary review. *Gonzalez* v. *O & G Industries, Inc.*, 322 Conn. 291, 302, 140 A.3d 950 (2016). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine,

in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . .'' (Internal quotation marks omitted.) Id., 302–303. Importantly, ''ambiguity exists only if the statutory language at issue is susceptible to more than one plausible interpretation.'' *State* v. *Orr*, 291 Conn. 642, 654, 969 A.2d 750 (2009). In other words, ''statutory language does not become ambiguous merely because the parties contend for different meanings.'' (Internal quotation marks omitted.) *Allen* v. *Commissioner of Revenue Services*, 324 Conn. 292, 309, 152 A.3d 488 (2016).

In accordance with § 1-2z, we begin our analysis with the relevant statutory text. Section 17a-10 (c) provides in relevant part: ''When deemed in the best interests of a child in the custody of the commissioner, the commissioner, the commissioner's designee, a superintendent or assistant superintendent or, when the child is in transit between department facilities, a designee of the commissioner, may authorize, on the advice of a physician licensed to practice in the state, *medical treatment, including surgery*, to insure the continued good health or life of the child. . . .'' (Emphasis added.)

As the statute does not define the phrase "medical treatment," in accordance with General Statutes § 1-1 (a), we look to the common understanding expressed in dictionaries in order to afford the term its ordinary meaning. See, e.g., *Standard Oil of Connecticut, Inc.* v. *Administrator, Unemployment Compensation Act*, 320 Conn. 611, 645, 134 A.3d 581 (2016). The American Heritage College Dictionary (4th Ed. 2007) defines "treatment" as the "[a]dministration or application of *remedies* to a patient for a disease or injury . . . ." (Emphasis added.) Similarly, Black's Law Dictionary (4th Ed. 1968) defines the word "treatment" as "[a] broad term covering all *the steps taken to effect a cure of an injury or disease*; the word including examination and diagnosis as well as application of *remedies*." (Emphasis added.) These definitions, and particularly their focus on remedies,[6] make clear that the phrase "medical treatment" in § 17a-10 (c) contemplates the cure of an existing illness, injury, or disease.

The commissioner, however, relies on other definitions of "treatment" that include the "mitigation" of a disease or illness. See The American Heritage Dictionary of the English Language (5th Ed. 2011) (defining "treatment" as "[t]he use of an agent, procedure, or regimen, such as a drug, surgery, or exercise, in an attempt to cure or mitigate a disease, condition, or injury"). The definition of "mitigate," however, is to "make or become milder, less severe, less rigorous or less painful . . . ." Webster's New World Dictionary (2d Ed. 1972). Thus, the commissioner's contention that the phrase "medical treatment" includes vaccinations because they "mitigate" against the possibility of con-

[6] The American Heritage College Dictionary (4th Ed. 2007) defines "remedy" as "[s]omething, such as medicine, that relieves pain, cures disease, or corrects a disorder." See also Webster's New World Dictionary (2d Ed. 1972) (defining remedy as "any medicine or treatment that cures, heals, or relieves a disease or bodily disorder or tends to restore health").

tracting a disease does not comport with the plain meaning of the word "mitigate" because the definition of that term contemplates addressing a presently existing condition. Put differently, one cannot mitigate an ailment that may or may not arise in the future.

Ambiguity arises, however, because the plain meaning of "medical treatment" with respect to vaccinations conflicts with the subsequent phrase in § 17a-10 (c), namely, to "insure the continued good health or life of the child." The phrase "continued good health" reasonably may be read to suggest that the commissioner may seek preventive "medical treatment" for a healthy child in her custody. This contrasts with the plain meaning of "medical treatment," which requires an existing illness to trigger the commissioner's authority to seek "medical treatment." Accordingly, we conclude that this apparent conflict renders § 17a-10 (c) ambiguous.

In resolving this ambiguity, we first look to other portions of the language in § 17a-10 (c) and related statutes. We begin with the well settled principle that, "[a]ccording to the [doctrine] of ejusdem generis, unless a contrary intent appears, where general terms are followed by specific terms in a statute, the general terms will be construed to embrace things of the same general kind or character as those specifically enumerated." (Internal quotation marks omitted.) *Balloli* v. *New Haven Police Dept.*, 324 Conn. 14, 23, 151 A.3d 367 (2016). Here, in § 17a-10 (c), the phrase "medical treatment" is modified by the phrase "including surgery." As "medical treatment" is a general term and "surgery" is more specific, "medical treatment" should be construed to include medical procedures akin to surgery, such as procedures undertaken to remedy an existing illness, injury, or disease, rather than prophylactic measures such as vaccinations.

This reading of § 17a-10 (c) is also supported by reference to related statutes contained in title 17a of the

General Statutes. See, e.g., *Mayer* v. *Historic District Commission*, 325 Conn. 765, 777, 160 A.3d 333 (2017) ("looking beyond [General Statutes] § 8-8 [a] [1], related statutes affecting land use appeals demonstrate that, if the legislature wanted to create statutory aggrievement in historic district cases, it could have done so expressly" [internal quotation marks omitted]). In contrast to § 17a-10 (c), several other provisions in title 17a specifically reference both treatment *and prevention*. See General Statutes § 17a-49 (a) (directing the commissioner to develop programs for the "treatment and prevention" of child abuse and neglect); General Statutes § 17a-22g (a) (discussing behavioral health and substance abuse "prevention and treatment"). Had the legislature intended for § 17a-10 (c) to allow for preventative measures, it could have included that language in this provision. See, e.g., *State* v. *Heredia*, 310 Conn. 742, 761, 81 A.3d 1163 (2013) ("[w]hen a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed" [internal quotation marks omitted]).[7]

If the legislature's intent is clear from the statute's plain and unambiguous language, our inquiry ends. See,

[7] We note that other provisions in title 17a of the General Statutes provide additional circumstances in which the commissioner may authorize medical care for children. For example, § 17a-101g (f) provides in relevant part that, during a ninety-six hour hold, the commissioner "shall provide the child with all necessary care, *including medical care*, which may include an examination by a physician or mental health professional with or without the consent of the child's parents, guardian or other person responsible for the child's care, provided reasonable attempts have been made to obtain consent of the child's parents or guardian or other person responsible for the care of such child. During the course of a medical examination, *a physician may perform diagnostic tests and procedures necessary for the detection of child abuse or neglect*. . . ." (Emphasis added.) Thus, while title 17a enumerates several instances in which the commissioner may authorize medical care, it does not provide for the authorization of preventative care, such as vaccinations.

e.g., *State* v. *Wright*, 320 Conn. 781, 801, 135 A.3d 1 (2016). Where, as here, however, "the statute is ambiguous . . . we go on to consider extratextual evidence of its meaning, such as the statute's legislative history, the circumstances surrounding its enactment, the legislative policy the statute implements, and the statute's relationship with existing legislation and common-law principles." Id.

Accordingly, we examine the legislative history of § 17a-10 (c). As originally enacted in 1969, § 17a-10 did not authorize the commissioner to seek any medical treatment for children in his or her care. See Public Acts 1969, No. 664, § 11. The legislative history of No. 295 of the 1971 Public Acts, which added the "medical treatment" language to § 17a-10, indicates that the legislature did not contemplate extending the commissioner's authority beyond emergency situations. As one of the sponsors of the underlying bill explained,[8] that language "provides that the [commissioner] shall be empowered and authorized to have *emergency medical treatment* given to any ward placed in his custody regardless of which institution he is situated in. This presently is not possible and the Attorney General last year was forced to give a ruling indicating that *the [c]ommissioner had no power even in the face of an emergency. So this clarifies that situation . . . .*"[9] (Emphasis added.) 14 H.R. Proc., Pt. 5a, 1971 Sess., p. 2201, remarks of Representative John Papandrea. Similarly, during the hearings on the bill, its drafter,[10]

[8] When considering legislative history, "[w]e pay particular attention to statements of the legislators who sponsored the bill." *Doe* v. *Marselle*, 236 Conn. 845, 852 n.9, 675 A.2d 835 (1996).

[9] We note that we have not reviewed the opinion of the Attorney General discussed in the legislative history because it is not included in the parties appendices and was not readily available in the Connecticut State Library.

[10] "[I]t is now well settled that testimony before legislative committees may be considered in determining the particular problem or issue that the legislature sought to address by the legislation. . . . This is because legislation is a purposive act . . . and, therefore, identifying the particular problem that the legislature sought to resolve helps to identify the purpose or pur-

an employee of the department, testified as follows: "The other part of this [b]ill, relates to medical care to children [within] our custody. They provide that the [c]ommissioner, or his designee, may, upon the advice of a licensed physician or dentist, *authorize emergency dental care or physical care*, *including surgery*, for a child in our custody. This we think is a necessary provision. We find that as a matter of fact, children are most apt to be accident prone on weekends and that's the most difficult time to get a hold of their parents. We find further, that many of our parents who have children are not easily located." (Emphasis added.) Conn. Joint Standing Committee Hearings, Corrections, Welfare and Humane Institutions, Pt. 1, 1971 Sess., p. 186, remarks of John Dorman. Thus, the legislative history demonstrates that the 1971 amendments to § 17a-10 were far from an expansive grant of authority to provide routine preventative care to children committed to temporary custody but, rather, only were intended to grant the commissioner the limited authority to provide "medical treatment" during an emergency if and when a child's parents could not be reached.[11]

poses for which the legislature used the language in question." (Internal quotation marks omitted.) *Hatt* v. *Burlington Coat Factory*, 263 Conn. 279, 314, 819 A.2d 260 (2003).

[11] We note that the respondents rely on § 10-204a (a) (3), which provides in relevant part that "[e]ach local or regional board of education, or similar body governing a nonpublic school or schools, shall require each child to be protected by adequate immunization against" numerous infectious diseases "before being permitted to enroll in any program operated by a public or nonpublic school under its jurisdiction. . . . Any such child who . . . (3) presents a statement from the parents or guardian of such child that such immunization would be contrary to the religious beliefs of such child or the *parents or guardian* of such child . . . shall be exempt from the appropriate provisions of this section. . . ." (Emphasis added.) The respondents contend that this statutory right is limited to parents or guardians with custody of a child.

In response, the commissioner argues that she, not the respondents, holds the right to claim any religious exemption to vaccination under § 10-204a (a) (3) because, under General Statutes § 46b-129 (j) (4), the trial court's order of temporary custody "revoked" the respondents' "guardianship

rights" and rendered her the "guardian" of the children. The commissioner asserts that this order includes the rights and responsibilities of a "guardian" as defined by General Statutes § 17a-1 (12) (B), including the "authority to make major decisions affecting the child's or youth's welfare, including, but not limited to, consent determinations regarding . . . major medical, psychiatric or surgical treatment . . . ." The commissioner also relies on the similar definition of "guardianship" in the probate court statutes, specifically General Statutes § 45a-604 (5) (B).

As Chief Justice Rogers recognizes in her concurring opinion, the parties' statutory arguments on this point are complicated by the constitutional issues presented in view of the fact that, although the children have been committed to the custody of the commissioner, the respondents' parental rights remain intact. See *Walsh* v. *Jodoin*, 283 Conn. 187, 199, 925 A.2d 1086 (2007) ("[t]his court should try, whenever possible, to construe statutes to avoid a constitutional infirmity, but may not do so by rewriting the statute or by eschewing its plain language" [internal quotation marks omitted]); see also, e.g., *Santosky* v. *Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) ("[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the [s]tate"); *Diana H.* v. *Rubin*, 217 Ariz. 131, 139–40, 171 P.3d 200 (App. 2007) (statutory scheme recognizing mother's "residual parental rights" while child was in temporary custody of child welfare agency required demonstration of compelling state interest to override mother's religious objection to vaccination of child); *Dept. of Human Services* v. *S.M.*, 355 Or. 241, 253–55, 323 P.3d 947 (2014) (holding that state child welfare agency has "statutory authority to immunize [children in its custody] against common childhood diseases" but recognizing that agency's rules provide procedures to protect parents' constitutional rights during period of temporary custody).

Insofar as the commissioner relies primarily on § 17a-10 (c) as the basis for her authority to vaccinate the children in the present case, we leave to another day full consideration of the division of rights between the commissioner and parents under our statutory scheme while children are committed to temporary custody. This is particularly so, given that § 10-204a (a) (3), the respondents' reliance on which occasioned the commissioner's reliance on § 17a-1 (12) (B), is inapplicable in this case given that the record does not indicate that an educational exemption is at issue—likely because the children have not yet reached school age. Moreover, the definition in § 17a-1 (12) (B), on which the commissioner relies, does not appear by its own terms to govern the *temporary* custody situation presented in this case, insofar as it specifically defines "[g]uardian" as a "person who has a judicially created relationship between a child or youth and such person that is intended to be *permanent and self-sustaining* . . . ." (Emphasis added.) Accordingly, we leave to another day a more comprehensive examination of the statutory scheme.

Accordingly, we conclude that § 17a-10 (c) does not authorize the commissioner to vaccinate children committed to her temporary custody without parental consent.[12] The trial court, therefore, improperly granted the commissioner permission to vaccinate the children in light of the respondents' objection.

The decision of the trial court denying the respondents' motion seeking to prevent vaccination of the children is reversed and the case is remanded to that court with direction to grant the respondents' motion.

In this opinion the other justices concurred.

ROGERS, C. J., with whom EVELEIGH, J., joins, concurring. I agree and join with the majority's holding that General Statutes § 17a-10 (c)[1] does not authorize

[12] While some may question the wisdom of not authorizing the commissioner to vaccinate children in her custody, "[p]articularly [i]n areas where the legislature has spoken . . . the primary responsibility for formulating public policy must remain with the legislature." *Mayer* v. *Historic District Commission*, supra, 325 Conn. 780. Given the policy considerations identified by the commissioner with respect to vaccination, "it remains the prerogative of the legislature to modify or clarify [the relevant statutory provisions] as it sees fit." (Internal quotation marks omitted.) Id., 780 n.10.

[1] General Statutes § 17a-10 (c) provides: "When deemed in the best interests of a child in the custody of the [Commissioner of Children and Families], the commissioner, the commissioner's designee, a superintendent or assistant superintendent or, when the child is in transit between [Department of Children and Families] facilities, a designee of the commissioner, may authorize, on the advice of a physician licensed to practice in the state, medical treatment, including surgery, to insure the continued good health or life of the child. Any of said persons may, when he or she deems it in the best interests of the child, authorize, on the advice of a dentist licensed to practice in the state, dentistry, including dental surgery, to insure the continued good health of the child. Upon such authorization, the commissioner shall exercise due diligence to inform the parents or guardian prior to taking such action, and in all cases shall send notice to the parents or guardian by letter to their last-known address informing them of the actions taken, of their necessity and of the outcome, but in a case where the commissioner fails to notify, such failure will not affect the validity of the authorization."

the Department of Children and Families (department), to vaccinate children in the temporary custody of the petitioner, the Commissioner of Children and Families (commissioner), over the religious objection of the respondent parents, Giordan T. and Nicanol T. I write separately in order to more fully address the commissioner's claim that, as the guardian of children committed to her temporary custody pursuant to General Statutes § 46b-129 (j) (4),[2] she has all of the rights and obligations of a guardian as set forth in General Statutes § 17a-1 (12),[3] including the right to authorize the vaccination of such children. In support of this contention, the commissioner points out that, on August 23, 2016, the trial court issued a form order stating that "[t]he child or youth is committed until further order of the court to the Commissioner of Children and Families who shall be the guardian of the child or youth according to the statutes in such cases."

[2] General Statutes § 46b-129 (j) (4) provides in relevant part: "The commissioner shall be the guardian of [a] child [committed to the custody of the commissioner] for the duration of the commitment . . . ."

[3] General Statutes § 17a-1 (12) (B) defines " 'guardian' " in relevant part as "a person who has a judicially created relationship between a child or youth and such person that is intended to be permanent and self-sustaining as evidenced by the transfer to such person of the following parental rights with respect to the child or youth . . . the authority to make major decisions affecting the child's or youth's welfare, including, but not limited to . . . major medical, psychiatric or surgical treatment . . . ."

The commissioner contends that, because she is the guardian of children in her temporary custody, she has the authority under General Statutes § 10-204a (a) to determine whether to invoke the exemption to the immunization requirement when immunization would be contrary to the religious beliefs of such children. See General Statutes § 10-204a (a) (3) (exempting from immunization requirement "[a]ny such child who . . . presents a statement from the parents or guardian of such child that such immunization would be contrary to the religious beliefs of such child . . . shall be exempt from the appropriate provisions of this section"). If § 17a-1 (12) confers this authority, however, it necessarily confers the authority to make *all* decisions concerning the welfare of such children, including the authority to authorize vaccinations in the first instance. Thus, the commissioner effectively contends that the authority conferred on it by § 17a-10 (c) is superfluous to its authority as the guardian of children in its temporary custody.

The genealogy and legislative history of the relevant statutes, however, do not support the claim that the commissioner is the exclusive guardian of children who are temporarily committed to her custody, with all of the rights and obligations set forth in § 17a-1 (12). In 1971, the predecessor to § 46b-129 (j) (4) provided that the "welfare commissioner" was the guardian of a child who was committed to his custody. See General Statutes (Supp. 1969) § 17-62 (d). Notwithstanding this provision and the fact that certain children were committed to both the Welfare Commissioner and the Commissioner of Children and Youth Services, at some point in 1970 or 1971, the Attorney General wrote an opinion indicating that the Commissioner of Children and Youth Services could not authorize medical treatment for children in his custody because he was only their custodian.[4] See Conn. Joint Standing Committee Hearings, Corrections, Welfare and Humane Institutions, 1971 Sess., Pt. 1, p. 185–86, remarks of John Dorman, Special Assistant to the Commissioner of Children and Youth Services (referencing "dual commitments" where child is committed to the Department of Welfare and Commissioner of Children and Youth Services, and noting recent opinion of Attorney General that state cannot authorize medical treatment for children in its custody because it has "mere custody of the child and not guardianship"); 14 H.R. Proc., Pt. 5a, 1971 Sess., p. 2201, remarks of Representative John F. Papandrea ("[This bill] provides that the Commissioner of Children and Youth Services shall be empowered and authorized to

[4] This opinion is not available in the Connecticut State Library. Accordingly, it is unclear to which state entity—the Welfare Commissioner or the Department of Children and Youth Services—the opinion was directed. As I discuss later in this concurring opinion, however, the legislature responded to the Attorney General's opinion by authorizing the Commissioner of Children and Youth Services to authorize medical services for children in his custody. Accordingly, it is reasonable to conclude that the opinion was directed at that commissioner.

have emergency medical treatment given to any ward placed in his custody . . . . This presently is not possible and the Attorney General last year was forced to give a ruling indicating that the commissioner had no power even in the face of an emergency."). Because these agencies lacked authority to authorize medical treatment for children in their custody, the legislature enacted No. 295 of the 1971 Public Acts, enabling the Commissioner of Children and Youth Services to authorize medical treatment for children in his custody. See General Statutes (Supp. 1971) § 17-418 (c). Notably, however, neither the original version of § 17a-10 (c), which referred to the Commissioner of Children and Youth Services; see Public Acts 1971, No. 295, § 1; nor the current version, which refers to the commissioner; see Public Acts 1993, No. 93-91 (amending § 17a-10 [c] to substitute "Commissioner of Children and Families" for "Commissioner of Children and Youth Services"); expressly provides that the agency to which a neglected or abused child is committed, or the commissioner of that agency, is the child's guardian. Moreover, as the majority opinion points out, the legislative history of § 17a-10 (c) indicates that it was intended only to grant the Commissioner of Children and Youth Services the authority to authorize medical treatment in emergency situations when that commissioner could not obtain the consent of the parents. See 14 H.R. Proc., supra, p. 2201. Accordingly, the statute cannot reasonably be interpreted as giving the agency to which a child is temporarily committed all of the broad rights of a guardian with respect to the medical treatment of a child.[5]

[5] Although General Statutes (Supp. 1969) § 17-62 (d) provided that the Welfare Commissioner was the guardian of children committed to his custody, and No. 295 of the 1971 Public Acts was directed at the Commissioner of Children and Youth Services, it is clear that the Welfare Commissioner did not have all of the rights and obligations of a guardian. If he had, then he could simply have authorized the Commissioner of Children and Youth Services to provide medical treatment to children in his temporary custody.

It follows, therefore, that § 17a-1 (12), which was enacted in 1998; see Public Acts 1998, No. 98-241; also cannot be interpreted as giving the commissioner all of the rights of a guardian. First, as I have just explained, the enactment of Public Act 1971, No. 295, in 1971 was premised on the legislature's understanding that the state agency having temporary custody of neglected or abused children was *not* the guardian of those children for all purposes, notwithstanding the fact that General Statutes (Supp. 1969) § 17-62 (d) provided that the Welfare Commissioner was the guardian of a child also committed to the custody of the Commissioner of Children and Youth Services. I am aware of no intervening law that broadened the guardianship rights of those commissioners. A statute, such as § 17a-1 (12), that *defines* guardianship rights and obligations does not, ipso facto, *confer* guardianship rights and obligations on any particular person or entity.

Second, by its plain terms, § 17a-1 (12) applies to "a person who has a judicially created relationship between a child or youth and such person that is intended to be *permanent and self-sustaining* . . . ." (Emphasis added.) This is not the case when the commissioner has only temporary custody of a child and the parents' rights have not yet been terminated. Third, the legislative history of § 17a-1 (12) provides no support for the proposition that it was intended to give the commissioner exclusive guardianship rights over children in her temporary custody.[6]

[6] Section 17a-1 (12) was enacted in response to Congress' enactment of the Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (ASFA). See Conn. Joint Standing Committee Hearings, Judiciary, Pt. 7, 1998 Sess., p. 2175, written testimony of Kristine D. Ragaglia, Commissioner of the Department of Children and Families (explaining that § 17a-1 [12] was intended to address AFSA requirement that states define guardian). Section 101 (b) of the AFSA, codified at 42 U.S.C. § 675 (7) (2012), defines "legal guardianship" as "a judicially created relationship between child and caretaker which is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of the following parental rights with respect to the child: protection, education, care and control of the person, custody

Thus, the legislative genealogy and history of the relevant statutory scheme support the conclusion that, when the legislature enacted the predecessor to § 17a-10 (c) in 1971 it contemplated that the Commissioner of Children and Youth Services had, at most, a form of joint guardianship with the parents of a child who had been temporarily committed to him, and the rights of the parents had not been terminated. The legislature did not intend to confer the exclusive and unfettered authority to authorize any and all forms of medical treatment, provided only that such treatment was in the child's best interest. Moreover, the enactment of § 17a-1 (12) in 1998 did not expand the commissioner's rights as a coguardian of children in her temporary custody. Indeed, the department's own guidelines provide that "[t]he Area Office Social Work or Juvenile Justice staff shall refer a case to the Medical Review Board when . . . the treatment may be contrary to the

of the person, and decisionmaking." (Internal quotation marks omitted.) Title 42 of the United States Code, § 675 (2), provides: "The term 'parents' means biological or adoptive parents or legal guardians, *as determined by applicable State law*." (Emphasis added.) When the ASFA was enacted in 1997, however, Connecticut's laws governing commitment of a child and termination of parental rights did not define "legal guardian." Accordingly, to address this gap, the legislature enacted § 17a-1 (12), apparently taking the language "permanent and self-sustaining as evidenced by the transfer . . . of the following parental rights" from the federal statute, and the enumerated rights and obligations from General Statutes § 45a-604 (5); see Public Acts 1973, No. 156; that defines "guardianship" for probate purposes. The legislative history of No. 98-241 of the 1998 Public Acts, which, in addition to enacting § 17a-1 (12), made numerous changes to the statutes governing commitment to the commissioner and termination of parental rights, indicates that the general purpose of the legislation was to shorten the period in which children committed to the commissioner are in limbo. See Conn. Joint Standing Committee Hearings, Judiciary, Pt. 6, 1998 Sess., p. 1856, remarks of Attorney General Richard Blumenthal ("this bill essentially aims to move [decisions regarding the disposition of abused and neglected children] more quickly . . . [and] [t]he thrust of this measure is to provide for adoptive homes as soon as possible so that they can be secure, permanent [and] stable, where reunification is not a realistic hope"). I see *no* evidence that the purpose of § 17a-1 (12) was to make the commissioner the exclusive guardian of children in her temporary custody.

wishes of a parent or legal guardian . . . .'' Department of Children and Families, ''Practice Guide: Standards and Practice Regarding the Health Care of Children in [the Department of Children and Families'] Care'' (2014), p. 22. Those guidelines also provide that the staff member who refers a case to the Medical Review Board ''shall work with the [Regional Resource Group] Nurse or Nurse Practitioner to make personal contact with the parents . . . and the parents' . . . attorneys . . . to ensure that they each understand the medical plan, understand the risks and benefits, are in agreement with it, and consent.'' Id., p. 23. Thus, the department clearly is operating under the assumption that parents continue to have an important role in making medical decisions for their children even when they have temporarily lost custody of them.[7] This interpretation is also consistent with the important constitutional rights at issue, namely, the parents' substantive due process right to raise their children as they see fit, including the right to control the children's religious upbringing. See *Santosky* v. *Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) (''The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the [s]tate. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.''); see also *State* v. *DeCiccio*, 315 Conn. 79, 149, 105 A.3d 165 (2014) (''[i]t is well established that this court has a duty to construe statutes, whenever possible, to avoid constitutional infirmities'' [internal quotation marks omitted]).

[7] I emphasize that my sole focus in this concurring opinion is on the right of the commissioner to make medical decisions for children in her temporary custody when the rights of the parents have not been terminated. I express no opinion on the rights or obligations of the commissioner to care for children in her temporary custody in other contexts.

Accordingly, it is reasonable to conclude that § 17a-10 (c) was intended to apply only when the commissioner has a compelling reason to seek immediate medical treatment for a child in her temporary custody and there may be insufficient time to obtain the consent of the parents, i.e., in medical emergencies. When immediate medical treatment is not required to ensure the good health of the child the statute does not apply, and, in the absence of any other express statutory source to authorize medical services or treatment for the child, the commissioner must attempt to obtain the consent of the parents as the child's coguardians. If the parents cannot be found, I would conclude that the commissioner must make that representation to a court and seek to obtain an order allowing the commissioner to authorize medical treatment. Similarly, the commissioner must obtain a court order if the parents object to the medical treatment.[8]

With respect to the legal standard to be applied in cases in which the commissioner is seeking a court order authorizing the medical treatment of a child in its temporary custody over the objection of the parents, my research has revealed no Connecticut case that address this issue, or the issue of when a court may order medical treatment for a child in the parents' custody over the objection of the parents. *In the Matter of McCauley*, 409 Mass. 134, 136–37, 139, 565 N.E.2d 411 (1991), the Supreme Judicial Court of Massachusetts addressed the latter question and concluded that the rights of parents to make decisions for their children, the child's interest in continuing good health and the

[8] Of course, as a matter of common sense, the commissioner may also authorize medical treatment for children in her temporary custody with respect to the minor scrapes and bruises that are an everyday occurrence during childhood without obtaining the consent of the parents or a court order. I need not, however, determine the outer limits of that authority here.

state's parens patriae interest must be balanced.[9] I

[9] The court stated in *McCauley*: "We are faced with the difficult issue of when a [s]tate may order medical treatment for a dangerously ill child over the religious objections of the parents. . . . [T]here are three interests involved: (1) the natural rights of parents; (2) the interests of the child; and (3) the interests of the [s]tate. . . .

"Courts have recognized that the relationship between parents and their children is constitutionally protected, and, therefore, that the private realm of family life must be protected from unwarranted [s]tate interference. . . . The rights to conceive and to raise one's children are essential . . . basic civil rights . . . . The interest of parents in their relationship with their children has been deemed fundamental, and is constitutionally protected. . . . Parents, however, do not have unlimited rights to make decisions for their children. Parental rights do not clothe parents with life and death authority over their children. . . . The [s]tate, acting as parens patriae, may protect the well-being of children. . . .

"The right to the free exercise of religion, including the interests of parents in the religious upbringing of their children is, of course, a fundamental right protected by the [federal] Constitution. . . . However, these fundamental principles do not warrant the view that parents have an absolute right to refuse medical treatment for their children on religious grounds. . . .

"The [s]tate's interest in protecting the well-being of children is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. . . . The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. . . . [T]he power of the parent, even when linked to a free exercise claim, may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens. . . . When a child's life is at issue, it is not the rights of the parents that are chiefly to be considered. The first and paramount duty is to consult the welfare of the child." (Citations omitted; footnote added; internal quotation marks omitted.) *In the Matter of McCauley*, supra, 409 Mass. 136–37; see also *Diana H.* v. *Rubin*, 217 Ariz. 131, 136, 171 P.3d 200 (App. 2007) (under federal constitutional due process principles, when parents object to vaccination of child in temporary custody of state, "state must demonstrate a compelling interest to justify overriding the combination of religious and parental rights involved"); *In re G.K*, 993 A.2d 558, 566 (D.C. App. 2010) (under statute defining "residual parental rights," parents retained right to consent to certain medical treatment for child in legal custody of state); *In the Mattter of Lyle A.*, 14 Misc. 3d 842, 850, 830 N.Y.S.2d 486 (2006) (implicit in routine procedures used by Department of Human Services was that "[a] parent whose child is in foster care has the right to make the decision regarding whether or not his or her child will be given psychotropic drugs");

believe that this is an appropriate standard, and I would apply it even when the parents have lost temporary custody of their children to the commissioner.

With respect to the narrow question of whether the commissioner may authorize the vaccination of a child in her temporary custody over the religious objection of the child's parents, the Connecticut legislature has already concluded as a matter of public policy that the interest of parents in opting not to vaccinate their children on religious grounds outweighs the child's interest in being immune from certain diseases and the state's parens patriae interest in ensuring the well-being of the child and the public at large. See General Statutes § 10-204a.[10] In my view, the courts are bound by this policy determination. Accordingly, I would conclude in the present case that the commissioner had no authority either under § 17a-10 (c) or as the coguardian of the children in her temporary custody to authorize their vaccination over the parents' religious objection.

In the Matter of Martin F., 13 Misc. 3d 659, 676, 820 N.Y.S.2d 759 (2006) (if parent of child in temporary foster care opposes administration of mental health medicine it cannot lawfully be prescribed unless court determines "whether the proposed treatment by medication is narrowly tailored to give substantive effect to the [child] patient's liberty interest"); *Guardianship of Stein*, 105 Ohio St. 3d 30, 35–36, 821 N.E.2d 1008 (2004) ("the decision to withdraw life-supporting treatments goes beyond the scope of making medical decisions," and, therefore, "[t]he right to withdraw life-supporting treatment for a child remains with the child's parents until the parents' rights are permanently terminated"); but see *In re Deng*, 314 Mich. App. 615, 626–27, 887 N.W.2d 445 (because determination of unfitness "so breaks the mutual due process liberty interests as to justify interference with the parent-child relationship," state could vaccinate children in temporary custody over objection of parents pursuant to statute allowing parents to opt out based on religious objections [internal quotation marks omitted]), appeal denied, 500 Mich. 860, 884 N.W.2d 580 (2016).

[10] See footnote 3 of this concurring opinion for the relevant text of § 10-204a.

SALLY KELLOGG *v.* MIDDLESEX MUTUAL ASSURANCE COMPANY (SC 19803)

Palmer, Eveleigh, McDonald, Espinosa, Robinson, D'Auria and Vertefeuille, Js.*

Syllabus

Pursuant to statute (§ 52-418 [a] [3] and [4]), a trial court shall make an order vacating an arbitration award if it finds either that the arbitrators have been guilty of misconduct in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced, or if the arbitrators have exceeded their powers by manifestly disregarding the law.

The plaintiff sought to vacate an arbitration award setting the amount of the insured loss to her property resulting from a tree falling on the roof and chimney of her home during a storm. The plaintiff had filed a claim pursuant to a restorationist insurance policy issued by the defendant insurance company, under which payment of the full restoration cost of the insured property would be made in a two step process, with the defendant first making payment of the actual cash value of the loss, and, once the restoration or replacement was complete, paying the amount actually spent to repair, restore or replace the damaged building. When the plaintiff's appraiser and the defendant's appraiser were unable to agree on the amount of the loss, the plaintiff invoked the policy's appraisal provision, requiring the loss amount to be determined through an unrestricted arbitration proceeding. Under the terms of the policy, the plaintiff and the defendant each appointed one appraiser to serve as an arbitrator, and the two appraisers chose a neutral third party arbitrator to act as the umpire, all three of whom comprised the appraisal panel. After each appraiser independently estimated the loss, the umpire evaluated the differences between the two appraisers' estimates and set the loss, which was an amount between the two estimates. The defendant's appraiser accepted the umpire's valuation, which became the panel's decision on the amount of the loss. After the plaintiff filed its application to vacate, the defendant moved to dismiss as untimely the plaintiff's challenge to that portion of the arbitration award specific to the building. Although the trial court initially stated that it first would rule on the motion to dismiss, it held eight days of trial, covering all aspects of the motion to dismiss as well as the merits of the application to vacate. The trial court denied the motion to dismiss and granted the application to vacate the arbitration award because it violated § 52-418

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

(a) (3) and (4). The court determined that the panel prejudiced the plaintiff's substantial monetary rights by disregarding specific terms of the policy when it refused to award money for losses claimed by the plaintiff, and by manifestly disregarding the law by calculating depreciation when the policy provided for no depreciation. On appeal from the judgment granting the application to vacate, held:

1. The trial court improperly vacated the arbitration award and substituted its judgment for that of the panel when it determined that the award violated § 52-418 (3): that court's disagreement with the panel's ultimate conclusions and the amount of the award, in the absence of any determination that the panel engaged in misconduct impacting the fairness of the arbitration procedures, did not establish a violation of § 52-418 (3) and was not a proper ground for vacating the award; moreover, there was no claim that the arbitrators refused to postpone a hearing or to hear any of the plaintiff's evidence, or otherwise committed a procedural error, and there was testimony by the plaintiff's appraiser that the defendant's appraiser and the umpire considered all of the evidence that the plaintiff's appraiser wanted to present to them.
2. The trial court incorrectly concluded that the panel's decision to calculate depreciation when the restorationist insurance policy did not provide for depreciation evidenced a manifest disregard of the law that justified vacating the arbitration award pursuant to § 52-418 (a) (4): the court improperly engaged in a de novo review when it determined that the panel's decision to withhold depreciation was an error obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator, as the meaning of the policy language was a matter for the panel to decide, and the plain language of the policy permitted the withholding of depreciation until repairs were made or the damaged property was restored or replaced; furthermore, that court misinterpreted the holding in *Northrop* v. *Allstate Ins. Co.* (247 Conn. 242), which held only that an insurer could not withhold depreciation from a replacement cost award after a homeowner had incurred a valid debt for repairs, and was not applicable to estimates, such as the estimate obtained by the plaintiff, which generally impose no obligation or debt on homeowners and do not address concerns that the insured will forgo repairs and receive a windfall, and, thus, the panel did not ignore a clearly governing legal principle when it permitted the defendant to withhold depreciation costs until the plaintiff had incurred a valid debt for the repair or replacement of the property.

Argued May 4—officially released August 22, 2017

Procedural History

Application to vacate an arbitration award, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Kevin Tierney*, judge

trial referee, denied the defendant's motion to dismiss; thereafter, the case was tried to the court, *Hon. Kevin Tierney*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment granting the application to vacate, from which the defendant appealed. *Reversed; judgment directed.*

Stuart Glenn Blackburn, for the appellant (defendant).

Frank W. Murphy, for the appellee (plaintiff).

Wystan M. Ackerman filed a brief for the Property Casualty Insurers Association of America as amicus curiae.

Opinion

D'AURIA, J. In this appeal, we consider whether the trial court properly vacated an arbitration award setting the amount of an insured loss caused by a tree falling on the insured's home. We conclude that the trial court improperly substituted its judgment for that of the appraisal panel, and we therefore reverse the trial court's judgment.

The plaintiff, Sally Kellogg, is the owner of a historic property in the city of Norwalk (property). She insured the property through a "[r]estorationist" policy issued by the defendant, Middlesex Mutual Assurance Company. This restorationist policy was different from a typical homeowners policy in that it had no monetary policy limit, and it covered the replacement or restoration cost of the property without deduction for depreciation. Under the policy, payment of the full restoration cost would not be immediate, but would be made in two parts, with depreciation initially withheld. The policy required the defendant to first pay the actual cash value of the loss. Once the restoration or replacement was complete, the policy required the defendant to pay the amount "actually spent to repair, restore or replace the

damaged building."[1] This two step process is typical in replacement cost policies, intended to address concerns that a homeowner might accept the full restoration cost but not actually restore the property, thus receiving a windfall.[2]

While the restorationist policy was in effect, the property suffered a casualty loss when a four and one-half ton tree fell onto the roof and chimney during a storm, damaging the interior, exterior, and foundation of the home. Shortly after the incident, the plaintiff filed a claim on her restorationist policy. Because the plaintiff's and the defendant's adjusters were unable to agree on the amount of the loss, the plaintiff invoked the policy's appraisal provision. That provision required the loss amount to be determined through an unrestricted arbitration proceeding, meaning that the arbitrators are empowered to decide issues of law and fact, and the award is not conditioned on judicial review. See *Industrial Risk Insurers* v. *Hartford Steam Boiler Inspection & Ins. Co.*, 273 Conn. 86, 89 n.3, 868 A.2d 47 (2005).

To establish the appraisal panel, the plaintiff and the defendant, pursuant to the restorationist policy, each

[1] The policy language specifically provided: "Covered property losses are settled as follows:

"(a) . . . (1) We will pay the cost to repair, restore or replace, without deduction for depreciation . . . .

"(2) We will pay no more than the actual cash value of the damage until actual repair, restoration or replacement is complete. Once actual repair, restoration or replacement is complete, we will settle the loss according to the provisions of (a)(1) above."

[2] The "actual restoration" requirement is found in virtually every replacement and restoration cost policy. See 2 B. Ostrager & T. Newman, Handbook on Insurance Coverage Disputes (17th Ed. 2016) § 21.06 [b], pp. 1731–32 ("Many insurance policies expressly provide that an insured may recover the [actual cash value] of destroyed property, and subsequently make an additional claim on a replacement cost basis. . . . [S]uch policies invariably include as a condition precedent to a supplemental replacement cost recovery a requirement that the insured first complete restoration of its property." [Citations omitted.])

appointed one appraiser to serve as an arbitrator, and these two appraisers chose a neutral third arbitrator to act as an umpire. The appraisers each independently set the loss and submitted their valuations to the umpire. The plaintiff's appraiser claimed the damage was in excess of $1.6 million, but the defendant's appraiser believed the property could be restored for approximately $476,000. The appraisers fundamentally disagreed on two issues: the extent of damage caused by the tree, and the cost to repair the covered damage. The defendant's appraiser believed not all of the claimed damage was related to the incident and that much of the damage that was related could be fixed for less than the plaintiff's appraiser had claimed. The umpire evaluated the differences between the two appraisers' submissions and set the loss, which was an amount between the two submissions. Before setting the loss, the umpire visited the property seven times to evaluate the damage to the building and its contents. The umpire also reviewed and considered more than 300 pages of the plaintiff's submissions. He conducted hearings with multiple witnesses, including two asbestos abatement experts and a property damage expert. He also reviewed written submissions from other experts and consultants, all of which he considered when determining the award. On certain items, the umpire agreed with the valuations of the plaintiff's appraiser, and on other items he agreed with the defendant's appraiser. He then gave both appraisers his preliminary assessment of the loss and gave them an opportunity to challenge his assessment and to advocate for their respective positions.

The defendant's appraiser accepted the umpire's valuation, which became the appraisal panel's decision on the amount of the loss, and the panel issued its arbitration award in two parts: first, it awarded $578,587.64 for "replacement or restoration cost" of the building

on the property, which the panel depreciated to its actual cash value of $460,170.16, with the difference withheld until the plaintiff completed repairs, and, second, the panel later awarded an additional $79,731.68 for the actual cash value loss to the plaintiff's personal property.

Subsequently, the plaintiff filed an application with the Superior Court seeking to vacate the arbitration award, alleging it was defective under General Statutes § 52-418.[3] The defendant moved to dismiss as untimely the plaintiff's challenge to that portion of the arbitration award specific to the building.

The trial court initially stated that it would first rule on the motion to dismiss, but it then went on to hold eight days of trial, covering all aspects of the motion to dismiss as well as the merits of the application to vacate the arbitration award, before ultimately deciding both at the same time. Even though the parties had submitted all factual and legal issues to unrestricted arbitration, the trial court took evidence on the entire appraisal process, including evidence on valuation of the loss, despite the defendant's repeated objections that such a process was beyond the scope of an application to vacate and would constitute a substitution of the trial court's judgment for that of the appraisal panel. The trial court overruled the objections, stating in one instance: "This is a case involving the testimony right now of a homeowner who is seeking money damages

[3] General Statutes § 52-418 (a) provides in relevant part: "[The trial court] . . . shall make an order vacating the award if it finds any of the following defects: (1) If the award has been procured by corruption, fraud or undue means; (2) if there has been evident partiality or corruption on the part of any arbitrator; (3) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

so I'm treating it that way." Ultimately, the court accepted into evidence forty-two exhibits, containing hundreds of pages of documents, photographs, bills, and memoranda. The court also heard testimony from the umpire, the plaintiff's appraiser, and the plaintiff. The trial court allowed the plaintiff to present testimony about the value of the damage, the current state of her home, and whether the appraisal panel had reached the proper valuation.

On cross-examination of the plaintiff's appraiser, the defendant elicited testimony establishing the propriety of the arbitration proceedings. Although the plaintiff's appraiser disagreed with the amount of the panel's award, he did not question the umpire's conduct. To the contrary, he stated that the umpire had accepted all of the evidence he wanted to present to him, and the umpire never refused to hear any evidence regarding the loss. Nor did the plaintiff's appraiser accuse the umpire of being partial or unfair.

After the proceedings concluded, the court denied the defendant's motion to dismiss[4] and granted the plaintiff's application to vacate. The court determined that the arbitration award violated § 52-418 (a) for two reasons.

First, the trial court disagreed with the amount of the arbitration award. Relying on a valuation based on its own conclusions, the court decided that the award to the plaintiff was insufficient. The court identified thirty-four instances in which the plaintiff had claimed damage to a specific portion of the property and the panel awarded less than the plaintiff had requested, sometimes awarding nothing at all. The court apparently believed that by awarding less than the plaintiff

[4] On appeal, the defendant has challenged the trial court's ruling on its motion to dismiss. Because we reverse the trial court's judgment with direction to deny the application to vacate, we need not address this issue.

had requested, the panel had prejudiced the plaintiff's "substantial monetary rights" and, therefore, the plaintiff had sustained her burden of proof under § 52-418 (a) (3).

Second, the court ruled that the decision of the appraisal panel "evidenced a manifest disregard of the nature and terms and conditions of the [r]estorationist insurance policy," and, therefore, the plaintiff had sustained her burden under § 52-418 (a) (4). More specifically, the court concluded, based on its own interpretation of the policy language, that the panel's decision "[was] in obvious error" when it calculated depreciation in a policy that "provides for no depreciation . . . ." The trial court interpreted our decision in *Northrop* v. *Allstate Ins. Co.*, 247 Conn. 242, 249–52, 720 A.2d 879 (1998), to conclude that our law prohibited the defendant from withholding depreciation. The court then rendered judgment in favor of the plaintiff, vacating the arbitration award and remanding the matter for a new arbitration hearing.

The defendant appealed to the Appellate Court, and we transferred the case to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. On appeal, the defendant argues that the trial court erred in vacating the arbitration award because it engaged in an improper review of the evidence submitted to the appraisal panel. The defendant claims that the trial court substituted its judgment for that of the panel, instead of deferring to its findings and making every reasonable presumption in favor of the correctness of the award and the actions of the arbitrators. Applying de novo review of the trial court's decision; *Bridgeport* v. *Kasper Group, Inc.*, 278 Conn. 466, 475, 899 A.2d 523 (2006); we agree with the defendant that the trial court failed to properly defer to the arbitrators.

When considering a motion to vacate an unrestricted arbitration award, a trial court should not substitute its

judgment for that of the arbitrators. "Judicial review of arbitral decisions is narrowly confined. . . . When the parties agree to arbitration and establish the authority of the arbitrator through the terms of their submission, the extent of our judicial review of the award is delineated by the scope of the parties' agreement. . . . When the scope of the submission is unrestricted, the resulting award is not subject to de novo review even for errors of law so long as the award conforms to the submission. . . . In other words, [u]nder an unrestricted submission, the arbitrators' decision is considered final and binding; *thus*, *the courts will not review the evidence considered by the arbitrators nor will they review the award for errors of law or fact.*" (Emphasis added; internal quotation marks omitted.) *Comprehensive Orthopaedics & Musculoskeletal Care, LLC* v. *Axtmayer*, 293 Conn. 748, 753–54, 980 A.2d 297 (2009). Furthermore, "[e]very reasonable presumption and intendment will be made in favor of the award and of the arbitrator's acts and proceedings." *Bic Pen Corp.* v. *Local No. 134*, 183 Conn. 579, 585, 440 A.2d 774 (1981).

In light of these constraints, a court may vacate an unrestricted arbitration award only under certain limited conditions: "(1) the award rules on the constitutionality of a statute . . . (2) the award violates clear public policy . . . [or] (3) the award contravenes one or more of the statutory proscriptions of § 52-418." (Internal quotation marks omitted.) *Comprehensive Orthopaedics & Musculoskeletal Care, LLC* v. *Axtmayer*, supra, 293 Conn. 754. The trial court's ruling in the present case relied only on § 52-418, which sets out four defects that will justify vacating an award, only two of which are relevant here. The trial court found two of these defects present in the arbitration award. We conclude that neither of these grounds justified vacating the award and address each of the trial court's determinations in turn.

I

The trial court's first justification for vacating the arbitration award was that, in its view, the appraisal panel disregarded specific terms of the restorationist policy by refusing to award money for losses claimed by the plaintiff. The trial court therefore concluded that the panel had committed an "action by which the rights of [the plaintiff had] been prejudiced . . . ." See General Statutes § 52-418 (a) (3). More specifically, the trial court ruled that the panel had prejudiced the plaintiff's "substantial monetary rights . . . ." We disagree that this is a valid basis for vacating the arbitration award.

Section 52-418 (a) (3) provides that an arbitration award shall be vacated "if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced . . . ." This provision sets out three separate grounds for finding a defect in an arbitration: a refusal to postpone the hearing for good cause; a refusal to hear evidence; and an additional clause encompassing "any other action by which the rights of any party have been prejudiced . . . ." General Statutes § 52-418 (a) (3). Our cases have treated the third provision as applying to other varieties of *procedural* irregularity. See, e.g., *O & G/O'Connell Joint Venture* v. *Chase Family Ltd. Partnership No. 3*, 203 Conn. 133, 146–47, 523 A.2d 1271 (1987) (actions of arbitrators that warrant vacating arbitration award include participation in ex parte communications, ex parte receipt of evidence as to material fact without notice to party, holding hearings in absence of member of arbitration panel, and undertaking independent investigation into material matter after close of hearings and without notice to parties). We have not extended the reach of this clause to empower a court simply to disagree with

the arbiter's ultimate conclusions on the questions submitted to arbitration. See id.; see also *AFSCME, Council 4, Local 1303-325* v. *Westbrook*, 309 Conn. 767, 777, 75 A.3d 1 (2013) ("[i]t is clear that a party cannot object to an award [that] accomplishes precisely what the arbitrators were authorized to do merely because that party dislikes the results"). To do so would completely destroy the deference our law affords to the arbitration process by allowing the trial court to substitute its own judgment on the merits of the question submitted to arbitration. See *Comprehensive Orthopaedics & Musculoskeletal Care, LLC* v. *Axtmayer*, supra, 293 Conn. 753–54 (arbitration awards are not subject to de novo review). Rather, a challenge to an arbitration award under § 52-418 (a) (3) is limited to whether a party was "deprived of a full and fair hearing before the arbitration panel." (Internal quotation marks omitted.) *Bridgeport* v. *Kasper Group, Inc.*, supra, 278 Conn. 475.

In the present case, there was no claim that the arbitrators refused to postpone a hearing, refused to hear any of the plaintiff's evidence, or otherwise committed a procedural error. To the contrary, the plaintiff's own appraiser testified that both the defendant's appraiser and the umpire considered all of the evidence he wanted to present to them.

The trial court nevertheless vacated the arbitration award on the basis of its own disagreement with the appraisal panel's ultimate conclusions on the issue of valuation. The trial court disagreed with thirty-four aspects of the arbitration award and would have issued a greater award for these items. For example, the trial court indicated that the panel should have awarded the plaintiff more than $150,000 to repair the property's chimney, rather than the $19,000 it did award. In other instances, the trial court took issue with the panel's decision not to award any money for certain claimed damage, which the panel determined was not entitled

to coverage because it was not related to the tree falling on the house. The trial court used these points of disagreement as the basis for its conclusion that the decision of the appraisal panel had prejudiced the "substantial monetary rights" of the plaintiff. In the absence of any determination that the appraisal panel engaged in misconduct impacting the fairness of the arbitration *procedures*, the trial court's disagreement with the appraisal panel's ultimate conclusions cannot justify vacating its award. The appraisal panel was specifically empaneled to value the loss. Although it is clear that the trial court disagreed with the amount of the award, this disagreement does not establish that the arbitrators violated § 52-418 (a) (3) and was not a proper ground for vacating the arbitration award.

II

The trial court's second justification for vacating the arbitration award pursuant to § 52-418 (a) (4) was that the decision of the appraisal panel "manifestly disregard[ed]" the law when it "calculated depreciation in a [r]estorationist insurance policy that provide[d] for no depreciation . . . ." We disagree with this conclusion.

Section 52-418 (a) (4) provides that an arbitration award shall be vacated "if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made." This last section is commonly referred to as "manifest disregard of the law." *Garrity* v. *McCaskey*, 223 Conn. 1, 10, 612 A.2d 742 (1992). "We have [repeatedly] emphasized, however, that the manifest disregard of the law ground for vacating an arbitration award is narrow and should be reserved for circumstances of an arbitrator's extraordinary lack of fidelity to established legal principles." (Internal quotation marks omitted.) *Norwalk Police Union, Local 1727, Council 15, AFSCME, AFL-CIO* v. *Norwalk*, 324

Conn. 618, 629, 153 A.3d 1280 (2017). "[T]hree elements . . . must be satisfied in order for a court to vacate an arbitration award on the ground that the arbitration panel manifestly disregarded the law: (1) the error was obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator; (2) the arbitration panel appreciated the existence of a clearly governing legal principle but decided to ignore it; and (3) the governing law alleged to have been ignored by the arbitration panel is [well-defined], explicit, and clearly applicable." (Internal quotation marks omitted.) Id.

In the present case, the trial court concluded that the award of the appraisal panel met all three prongs of the manifest disregard of the law test. See id. The trial court determined that the award satisfied the first prong—the error was obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator—because the panel withheld depreciation in a policy that provides for no depreciation. The meaning of the policy language was a matter for the panel to decide, however, and the trial court should not have engaged in a de novo review of this issue. See *Harty* v. *Cantor Fitzgerald & Co.*, 275 Conn. 72, 80, 881 A.2d 139 (2005) (when submission to arbitrator is unrestricted, "the courts will not review the evidence considered by the arbitrators nor will they review the award for errors of law or fact" [internal quotation marks omitted]). More importantly, the trial court's conclusion is contradicted by the plain language of the policy, which clearly *permits* the withholding of depreciation until repairs are made or the damaged property is replaced. See footnote 1 of this opinion.

Furthermore, the trial court's conclusion that the panel's award satisfied the second and third prongs of the manifest disregard of the law test was also incorrect. The trial court interpreted our decision in *Northrop* to

hold that an insurer may not withhold payment for depreciation whenever a homeowner had obtained an estimate for repairs in excess of the actual cash value award, as the plaintiff did in the present case. But *Northrop* held only that an insurer could not withhold depreciation from a replacement cost award after a homeowner had *incurred a valid debt* for repairs. *Northrop* v. *Allstate Ins. Co.*, supra, 247 Conn. 251–52. *Northrop* does not apply to estimates, which generally impose no obligation or debt on the homeowners and, unlike the incurrance of a valid debt, do nothing to address concerns that the insured will forgo repairs and receive a windfall. Consequently, we conclude that the trial court misinterpreted our holding in *Northrop*, and, thus, the panel did not ignore governing law or principles when it permitted the defendant to withhold depreciation costs until the plaintiff had incurred a debt for the repair or replacement of the property.

We conclude, therefore, that the trial court improperly vacated the arbitration award.

The judgment is reversed and the case is remanded with direction to render judgment denying the plaintiff's application to vacate the arbitration award.

In this opinion the other justices concurred.

COLE WILLIAMS ET AL. *v.* GENERAL NUTRITION CENTERS, INC., ET AL.
(SC 19829)

Palmer, Eveleigh, McDonald, Espinosa, Robinson and D'Auria, Js.*

Syllabus

Pursuant to a state wage law (§ 31-76c), employees not exempt from overtime pay must be paid at least one and one-half times their "regular rate" of pay for each hour they work in excess of forty hours in a week.

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

Pursuant to a state wage regulation (§ 31-62-D4), when an employee is paid a commission as a part of his or her earnings, the regular hourly rate for the purpose of calculating overtime is to be determined by dividing the "employee's total earnings by the number of hours in the usual [workweek] . . . ."

The plaintiffs, who were employed as managers at the defendants' retail stores in Connecticut, and who received sales commissions in addition to a base salary, sought damages from the defendants in federal court, claiming that the defendants' use of a certain method to calculate their rate of pay for the purpose of determining the amount they were entitled to in overtime pay violated state wage laws and regulations. The defendants used the fluctuating workweek method of calculating overtime pay, which is allowed under federal law, pursuant to which an employee's regular rate of pay is calculated by dividing total weekly pay by the number of hours he or she actually works in a given week. The regular rate of pay is then multiplied by one and one-half times for the hours beyond forty that an employee works that week to determine his or her overtime pay. The United States District Court certified to this court the question of whether a Connecticut employer may use the fluctuating workweek method to calculate overtime pay under state wage laws and regulations. *Held*:

1. The state wage laws, including § 31-76c, did not preclude the defendants' use of the fluctuating workweek method of calculating the plaintiffs' overtime pay: the wage laws were silent with respect to how to calculate the regular rate of pay for all types of employees other than delivery drivers and sales merchandisers, and, by setting a specific formula for only those categories of employees, the legislature apparently did not intend to limit the formulas for calculating overtime pay for other categories of employees, including the plaintiffs; moreover, § 31-76c was nearly identical to the federal overtime statute (29 U.S.C. 207 [a] [1]), which has been construed by the United States Supreme Court to allow the use of the fluctuating workweek method.

2. The plain meaning of the state wage regulations promulgated by the Department of Labor, including § 31-62-D4, requires mercantile or retail employers, such as the defendants, to determine an employee's regular rate of pay for the purpose of calculating overtime pay by dividing the employee's weekly pay by the hours the employee usually, rather than actually, works in a week, and, accordingly, the wage regulations precluded the defendants' use of the fluctuating workweek method to calculate the plaintiffs' overtime pay, as that method requires consideration of the hours the employee actually works; by setting forth a formula for retail employers, such as the defendants, to use when calculating overtime pay, the regulations left no room for an alternative formula, such as the fluctuating workweek method, the contrary interpretation of the regulations urged by the defendants was not supported by the text of § 31-76c and was unreasonable, the absence of enforcement

action by the Department of Labor to preclude the use of the fluctuating workweek method, without more, did not establish an official agency interpretation in favor of the use of such method that was entitled to judicial deference, and, because the meaning of the regulations and statutes governing overtime were plain and ambiguous, this court declined to consider potentially contrary extratextual evidence such as the legislative history of the wage laws.

Argued May 4—officially released August 17, 2017**

Procedural History

Action to recover damages for the defendants' alleged violations of Connecticut wage laws and regulations, and for other relief, brought to the United States District Court for the District of Connecticut, where the court, *Bryant, J.*, denied the defendants' motion to dismiss; thereafter, the court, *Bryant, J.*, certified a question of law to this court concerning the application of Connecticut wage laws and regulations.

Anthony J. Pantuso III, with whom, on the brief, were *Richard E. Hayber*, *Joshua R. Goodbaum* and *Stephen J. Fitzgerald*, for the appellants (plaintiffs).

Robert W. Pritchard, pro hac vice, with whom were *Lori B. Alexander* and, on the brief, *Matthew K. Curtin*, for the appellees (defendants).

Opinion

D'AURIA, J. Connecticut law requires employers to pay certain employees one and one-half times their "regular rate" of pay for any overtime hours they work. General Statutes § 31-76c. Calculating overtime pay for employees paid a fixed hourly wage is straightforward—their "regular rate" is their hourly wage, so they must be paid one and one-half times their hourly wage for each overtime hour worked. General Statutes § 31-76c. But for employees paid in whole or in part by commission, their average hourly rate will tend to fluc-

** August 17, 2017, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

tuate, leaving them without a readily apparent regular rate to use for calculating overtime pay. In the present case, we are asked to consider how employers must determine the regular rate for retail employees whose pay fluctuates each week because they receive commissions.

I

This case comes to us on a certified question from the United States District Court for the District of Connecticut. The factual record, although limited, contains the following facts. The plaintiffs, Cole Williams and Novack Lazare, worked as managers at General Nutrition Centers (GNC) stores in Connecticut, which are owned and operated by the defendants, General Nutrition Centers, Inc., and General Nutrition Corporation. The plaintiffs were paid a base weekly salary, plus commissions on sales of certain premium merchandise, and they received overtime pay whenever they worked more than forty hours in a week. Their base salaries were fixed, but their commission payments fluctuated week to week based on their sales.

The defendants calculated the plaintiffs' overtime pay using a method allowed under federal law, commonly known as the fluctuating workweek[1] method (fluctuating method). See *Overnight Motor Transportation Co.* v. *Missel*, 316 U.S. 572, 579–80, 62 S. Ct. 1216, 86 L. Ed. 1682 (1942); 29 C.F.R. §§ 778.114 and 778.118 (2016). This method is used to calculate the regular rate for salaried employees whose work hours fluctuate week to week and for employees whose pay varies each week because of commissions. See *Overnight Motor Trans-*

[1] To be consistent with the spelling of the word in the eleventh edition of Merriam-Webster's Collegiate Dictionary, we spell the term "workweek" throughout this opinion as one word unless it appears as two words in quoted material. There is no substantive difference between "workweek" and "work week" for purposes of our analysis.

portation Co. v. *Missel*, supra, 579–80; 29 C.F.R. §§ 778.114 and 778.118 (2016). Because these employees do not have a consistent hourly rate of pay, their regular rate is calculated each week by dividing their total weekly pay by the number of hours they worked during the week. See 29 C.F.R. §§ 778.114 and 778.118 (2016). This formula yields their regular rate for that week, which is used to determine their overtime pay. For example, if an employee has a weekly salary of $500 and works fifty hours in a given week, his regular rate is $10 per hour ($500/50), and his overtime rate is $15 per hour ($10 x 1.5). Because the employee has received only $10 per hour for each hour worked, he must be paid an additional $5 for each overtime hour to bring his pay to the required $15 per hour rate for all hours in excess of forty.

Under the fluctuating method, the employee's regular rate, and, therefore, his overtime pay rate, decreases as he works more overtime hours if he is paid a fixed salary. See *Overnight Motor Transportation Co.* v. *Missel*, 316 U.S. 579–80; *Stokes* v. *Norwich Taxi, LLC*, 289 Conn. 465, 479–80, 958 A.2d 1195 (2008). For example, suppose an employee is paid $500 per week and, in the first week, works fifty hours and, in the second week, works sixty hours. In the first week, the employee's regular rate is $10 per hour ($500/50); in the second week, it is $8.33 per hour ($500/60). The employee is entitled to one and one-half times his regular rate of pay for overtime hours, meaning that his overtime rate for the first week is $15 ($10 x 1.5) per overtime hour, whereas his overtime rate in the second week is $12.50 ($8.33 x 1.5) per overtime hour.

The plaintiffs brought an action against the defendants in the District Court,[2] claiming that the defen-

[2] The plaintiffs invoked the District Court's diversity jurisdiction. See 28 U.S.C. § 1332 (a) (2012). The plaintiffs did not assert any claims under federal law.

dants' use of the fluctuating method to calculate the plaintiffs' regular rate for purposes of determining their overtime pay rate violated Connecticut wage laws.[3] The plaintiffs rely on a state Department of Labor (department) fair minimum wage order (wage order) governing the calculation of overtime pay for mercantile (or retail) employees.[4] The plaintiffs contend that the wage order prohibits use of the fluctuating method because it requires use of an alternative formula. See Regs., Conn. State Agencies § 31-62-D4. Under the plaintiffs' interpretation of the wage order, an employer must calculate an employee's regular rate of pay by dividing his total weekly pay by the hours he *usually* works in a week, not the hours he *actually* works. For the plaintiffs, who claim they usually worked forty hour workweeks, this would yield a higher regular rate of pay than the fluctuating method would yield, which in turn would yield a greater overtime rate. For instance, if an employee made $500 per week, and worked fifty hours, his regular rate under the fluctuating method would be $10 per hour ($500/50), and he would be entitled to $15 for each

[3] Our reference to Connecticut wage laws includes the provisions in chapter 558 of the General Statutes.

[4] Wage orders are essentially agency regulations, and we interpret them as such. They were originally promulgated by the department pursuant to statutory authority allowing wage boards to set fair minimum wage and hour requirements for various trades. See generally General Statutes (Rev. to 2013) §§ 31-61 through 31-65. Those requirements were then promulgated as regulations by the department. The statutes authorizing the use of wage boards to set minimum wages have since been repealed; Public Acts 2015, No. 15-127, § 5; Public Acts 2013, No. 13-140, § 22; and this power now resides with the Commissioner of Labor. See General Statutes § 31-60 (b). Although the wage board procedure has been eliminated, the wage order at issue in this case has not been rescinded by the legislature or the department, and remains in effect. See Regs., Conn. State Agencies § 31-62-D1 et seq.; see also General Statutes § 31-68 (a) (authorizing cause of action for employer's violation of any wage order). We interpret the wage order in the same manner we would any other agency regulation. See generally *Amaral Bros., Inc.* v. *Dept. of Labor*, 325 Conn. 72, 79–80, 155 A.3d 1255 (2017) (interpreting wage order governing restaurant trade in same manner as agency regulation).

overtime hour. But, if he usually worked forty hours per week, his regular rate would be $12.50 per hour ($500/40), and he would be entitled to $18.75 for each overtime hour.

The plaintiffs moved for class certification on behalf of certain other employees at GNC stores in Connecticut. The District Court did not rule on the class certification motion but, instead, certified a question to this court asking "whether an employer may use the [fluctuating] method to calculate overtime pay pursuant to [Connecticut wage laws; see General Statutes § 31-58 et seq.] and the wage order" applicable to mercantile employees. See Regs., Conn. State Agencies § 31-62-D1 et seq.[5]

We accepted the question, which requires us to interpret Connecticut wage laws and regulations. Because we do not have the benefit of either a prior judicial or a time-tested agency construction of the applicable provisions, we construe the statutes and regulations in a plenary fashion.[6] See, e.g., *Sarrazin* v. *Coastal, Inc.*, 311 Conn. 581, 610, 89 A.3d 841 (2014). Moreover, because regulations have the same force and effect as statutes, we interpret both using the plain meaning rule.

[5] We have slightly rephrased the certified question for clarity. We have changed an abbreviation that the District Court used for the fluctuating method. In addition, we have substituted "Connecticut wage laws; see General Statutes § 31-58 et seq." for the Connecticut Minimum Wage Act, which appeared in the District Court's certification order. Our General Statutes do not designate any of its provisions as comprising such an act. The District Court did not provide a citation for this act, but a number of cases from the District of Connecticut; e.g., *Tapia* v. *Mateo*, 96 F. Supp. 3d 1, 2 (D. Conn. 2015); cite to the Connecticut Minimum Wage Act as General Statutes § 31-58 et seq. Accordingly, we have used this citation in our revision of the certified question.

[6] Although we will, in certain circumstances, defer to an agency's official interpretation of a regulation; see, e.g., *Sarrazin* v. *Coastal, Inc.*, 311 Conn. 581, 610 n.19, 89 A.3d 841 (2014); as we explain in part III B of this opinion, the parties have not provided us with any such official interpretation to defer to in the present case.

E.g., *Alexandre* v. *Commissioner of Revenue Services*, 300 Conn. 566, 578, 22 A.3d 518 (2011); see General Statutes § 1-2z. Applying these principles, we conclude that, although Connecticut wage laws do not prohibit the use of the fluctuating method for employees such as the plaintiffs, the wage order does.

II

We turn first to the relevant wage laws. Section 31-76c sets forth the requirement that employees not exempt from overtime pay must be paid at least one and one-half times their regular rate of pay for each hour they work in excess of forty hours in a week. That section provides: "No employer, except as otherwise provided herein, shall employ any of his employees for a workweek longer than forty hours, unless such employee receives remuneration for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." General Statutes § 31-76c.

The wage laws governing overtime pay do not define how to calculate the "regular rate" for employees like the plaintiffs. Although § 31-76c requires overtime pay of at least one and one-half times an employee's regular rate, it does not prescribe a method for determining the regular rate of employees not paid by the hour. Another provision, General Statutes § 31-76b (1), defines "regular rate," as used in § 31-76c, but it also does not explain how to calculate that rate, except for certain "delivery driver[s]" and "sales merchandiser[s] . . . ." Instead, § 31-76b (1) explains that, when calculating an employee's regular rate, an employer must include "all remuneration" paid to the employee, with certain exceptions. The last sentence of that provision sets forth a calculation method that applies only to employees "employed as a delivery driver or sales merchandiser . . . ." General Statutes § 31-76b (1). Their

regular rate must be determined by dividing the total weekly pay by forty. Id. Neither party in the present case, however, claims that the plaintiffs are delivery drivers or sales merchandisers.

Because the wage laws are silent as to how to calculate the regular rate for all other types of employees, nothing in the wage laws expressly prohibits use of the fluctuating method, and its approach of dividing total pay by actual hours worked, for employees who are not delivery drivers or sales merchandisers. By setting a specific formula for only one category of employees, it further appears that the legislature did not intend to limit the formulas that may be used for other categories of employees.

In addition, § 31-76c, which sets forth the overtime requirement, is nearly identical to the federal overtime statute, 29 U.S.C. § 207 (a) (1) (2012); see *Sarrazin* v. *Coastal, Inc.*, supra, 311 Conn. 596 (observing that § 31-76c "is indistinguishable from 29 U.S.C. § 207 [a] [1]"); and the United States Supreme Court has construed 29 U.S.C. § 207 (a) (1) to allow use of the fluctuating method. See *Overnight Motor Transportation Co.* v. *Missel*, supra, 316 U.S. 573 n.1, 579–80. We see no reason to interpret § 31-76c differently from its federal counterpart. Notably, the parties seem to agree on this point and have instead focused their arguments on whether the wage order allows use of the fluctuating method to compute the plaintiffs' regular rate.

We therefore conclude that the wage laws do not prohibit use of the fluctuating method to derive an employee's regular rate, with the sole exception of certain delivery drivers and sales merchandisers. See General Statutes § 31-76b (1).

III

We next consider whether the wage order prohibits the use of the fluctuating method for mercantile employ-

ees subject to its mandates. The wage order, promulgated by the department, applies to all employees in the "[m]ercantile trade"; (internal quotation marks omitted) Regs., Conn. State Agencies § 31-62-D1 (c); which includes employees in the retail sales business. See Regs., Conn. State Agencies § 31-62-D1 (c). The parties agree that the wage order governs the calculation of the plaintiffs' overtime pay, but they disagree whether it allows the use of the fluctuating method.

Like § 31-76c, the wage order requires that mercantile employees be compensated at a rate of one and one-half times their regular rate of pay for all overtime hours worked in a week. Regs., Conn. State Agencies § 31-62-D2 (c). The wage order requires that overtime pay be based on the employee's regular *hourly* rate of pay. Regs., Conn. State Agencies § 31-62-D2 (c). Section 31-62-D2 (c) of the Regulations of Connecticut State Agencies provides that "[n]ot less than one and one-half times the employee's regular hourly rate shall be paid for all hours in excess of forty in any work week." And § 31-62-D4 of the Regulations of Connecticut State Agencies provides in relevant part that employers "shall establish a regular hourly rate for employees covered by this wage order. . . ."

For employees whose pay fluctuates because of commissions, and thus cannot be fixed in advance, the wage order provides a formula for determining their regular hourly rate each week to be used in calculating overtime pay. See Regs., Conn. State Agencies § 31-62-D4. The relevant section of the wage order provides in relevant part: "When an employee is paid a commission in whole or in part for his earnings, the regular hourly rate for the purpose of computing overtime shall be determined *by dividing the employee's total earnings by the number of hours in the usual work week* as supported by time records made in accordance with the provisions

of section 31-62-D8."[7] (Emphasis added.) Regs., Conn. State Agencies § 31-62-D4. The parties in the present case disagree about what it means to divide by the "number of hours in the usual work week . . . ." Regs., Conn. State Agencies § 31-62-D4.

A

Turning first, as we must, to the text of the wage order, we interpret the phrase "number of hours in the usual work week" to refer to the number of hours an employee usually works in a week. The wage order does not define "usual work week," so we look to the common meaning of that phrase, as expressed in the dictionary. See, e.g., *Middlebury* v. *Connecticut Siting Council*, 326 Conn. 40, 49, 161 A.3d 537 (2017); see also General Statutes § 1-1 (a). The term "workweek" commonly refers to the hours worked during a week; for example, an employee who works a full-time schedule might say he has a forty hour workweek. See Webster's Third New International Dictionary (2002) p. 2635 (defining "workweek" in relevant part as "the hours . . . of work in a calendar week"). The wage order modifies "work week" with the adjective "usual," so the phrase "usual work week" naturally refers to the hours usually worked in a week. The plain meaning of "usual work week" in the wage order thus requires employers to divide the employee's pay by the hours usually worked in a week to calculate an employee's regular rate.

By setting forth its own formula for mercantile employers to use when computing overtime pay, one that requires them to divide pay by the usual hours

[7] Section 31-62-D8 of the Regulations of Connecticut State Agencies requires employers to keep records concerning each employee who is not exempt from overtime pay that indicate the employee's name, address, proof of age for minor employees, occupation, wages, and daily and weekly hours worked.

worked to calculate the regular hourly rate, the wage order leaves no room for an alternative calculation method. Although the wage order leaves it to the employer and the employee to determine the employee's compensation arrangement—whether and how much the employee will be paid in salary and commissions, if any—it does not leave room for them to agree to a different method for calculating the employee's regular rate for the purpose of computing overtime pay. The wage order thus precludes the use of the fluctuating method's divide by actual hours approach, at least for employees covered by the wage order.

B

The defendants offer an alternative interpretation of the meaning of "usual work week," but we conclude that it is not supported by the text and is unreasonable. The defendants argue that "work week" does not refer to the hours usually worked in a week but to the fixed weeklong period of seven days that the employer has designated for its weekly payroll accounting (e.g., Sunday through Saturday). They thus suggest that the wage order's command to divide by "the number of hours in the usual work week" means that an employer must divide pay by the number of hours the employee worked during the fixed one week period that the employer usually uses for payroll accounting. They claim that this therefore requires employers to use a divide by actual hours approach, just like the fluctuating method.

For support, the defendants rely on a federal interpretive bulletin promulgated by the United States Department of Labor, which explains that "[a]n employee's workweek is a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods" that the employer uses for its weekly payroll accounting. 29 C.F.R. § 778.105 (2016). The defendants argue that the interpretive bulletin establishes that the term "work-

week" is a legal term of art and that we must apply its specialized meaning instead of its dictionary definition in interpreting the wage order.

We disagree that "workweek" has become a legal term of art meaning only a fixed weeklong period, at least under Connecticut law. Our overtime laws and regulations have not adopted a definition similar to the one in the interpretive bulletin. And our overtime laws use the term in a manner that is inconsistent with the defendants' interpretation. Specifically, § 31-76c provides that "[n]o employer . . . shall employ any of his employees *for a workweek longer than forty hours* . . . ." (Emphasis added.) This reference to "workweek" clearly refers to the hours an employee has worked in the week and not to a fixed weeklong period.[8]

[8] Other labor statutes also use "workweek" in a manner that would be inconsistent with the defendants' interpretation. For example, General Statutes § 31-12 (c) governs labor of minors and provides procedures for establishing "a work week of less than five days" for these employees. The General Statutes contain other similar examples. See, e.g., General Statutes § 31-76b (1) (defining "regular rate" and referencing the "maximum workweek" allowed by overtime law); General Statutes § 31-76e (permitting collective bargaining agreements to require employees to work "a workweek in excess of the maximum workweek applicable to such employee" as long as they receive overtime pay); General Statutes § 31-76f (governing payment for piece-rate employees who work "a workweek in excess of the maximum workweek applicable to such employee"); General Statutes § 31-362d (defining "minijob" to refer to "a job with a maximum work week of twenty-five hours per week"); see also General Statutes § 5-245 (a) (governing compensation for state employees who work more hours than their "regular, established workweek"); General Statutes § 5-246 (a) (1) (governing compensation for any state police member or officer "who performs work . . . in addition to the hours of his regular workweek"); General Statutes § 7-292 (a) (permitting municipalities to "adopt an average work week of forty hours" for police officers); General Statutes § 7-293 (setting "average work week of not more than forty hours" for police officers); General Statutes § 7-304 (a) (allowing municipalities to adopt "an average work week of fifty-six hours" for firefighters); General Statutes § 7-305 (setting maximum "average work week of not more than fifty-six hours" for firefighters); General Statutes § 7-460c (allowing compensatory time for municipal employees "for each hour worked in excess of the maximum workweek of such employees").

Moreover, the wage order, if read in light of the defendants' interpretation of workweek—i.e., a fixed weeklong period—would make no sense. Applied literally, the defendants' interpretation would require employers to divide "by the number of hours in [a weeklong period]"; Regs., Conn. State Agencies § 31-62-D4; which is 168 hours and not the actual number of hours worked, as the defendants argue. This would result in an absurdly minuscule regular rate. The defendants obviously do not advocate for this result. Rather, the defendants' interpretation would make sense only if the wage order were rewritten to require the employer to divide the employee's total earnings by the number of hours *worked* in the usual work week, which is the phrasing used in the provision of the federal bulletin relied on the defendants but not in the wage order. See 29 C.F.R. § 778.118 (2016) ("the total [pay] is divided by the total number of hours *worked* in the workweek" [emphasis added]). Moreover, the defendants' interpretation would render the term "usual" superfluous, a result we must avoid whenever possible. See, e.g., *Connecticut Energy Marketers Assn.* v. *Dept. of Energy & Environmental Protection*, 324 Conn. 362, 377–78, 152 A.3d 509 (2016). If "workweek" referred to a fixed and unvarying period of seven days or 168 hours, there would be no need to refer to the number of hours in the "usual" workweek because all workweeks would have the same number of hours. We thus conclude that the defendants' suggested interpretation is not a reasonable one that the text supports.

In addition, other provisions in the wage order at issue and other department regulations are inconsistent with the defendants' interpretation. In stating the one and one-half times overtime pay requirement for mercantile employees, the wage order requires that "[n]ot less than one and one-half times the employee's regular hourly rate shall be paid for *all hours in excess of forty in any work week*." (Emphasis added.) Regs., Conn. State Agencies § 31-62-D2 (c). Similarly, another department regulation governs the filing of apprenticeship applications for employees who intend to work "a *substantially shorter work week* than is prevailing in the industry." (Emphasis added.) Regs., Conn. State Agencies § 31-51d-3 (b).

Apart from their interpretation of the wage order's text, the defendants also argue that the legislature considered banning use of the fluctuating method for all employees subject to overtime law and did not do so, indicating that it intended to allow its use in Connecticut. They point to the legislative history behind the regular rate calculation for delivery drivers and sales merchandisers in § 31-76b (1). The defendants argue that, in earlier drafts, the legislature considered adopting a specific calculation for all employees that would have curtailed use of the fluctuating method but ultimately chose to limit the reach of the new calculation to only delivery drivers and sales merchandisers. Because we consider the meaning of the wage order and the statutes governing overtime to be plain and unambiguous, however, we have no justification for considering this extratextual evidence. See General Statutes § 1-2z.

The defendants also assert that the department views Connecticut law as permitting use of the fluctuating method. They observe that there is no record of any enforcement action by the department to preclude use of the fluctuating method by mercantile employers, indicating that the department interprets the wage laws to allow its use. The defendants thus suggest that we should defer to this presumptive interpretation, but such deference is not warranted in the present case. Although we will, in certain circumstances, defer to an agency's interpretation of statutes and its own regulations, we do so only if the agency interpretation is adopted pursuant to its rule-making process or through formal adjudication. See, e.g., *Sarrazin* v. *Coastal, Inc.*, supra, 311 Conn. 610 n.19. The absence of enforcement action by the agency, without more, does not establish an official agency interpretation calling for judicial deference. See id. In the present case, the parties have not

directed us to any formal interpretation by the department, and we are aware of none.[9]

We therefore conclude that, for employees paid in whole or in part with commissions, the plain meaning of the wage order requires mercantile employers to determine an employee's regular hourly rate for the purpose of calculating overtime by dividing the employee's weekly pay by the hours the employee usually works in a week.[10] The employee must receive at least one and one-half times this regular hourly rate of pay for each overtime hour worked, taking into consideration the amount of pay the employee already received

[9] During our research, we discovered remarks from a department representative to a legislative committee indicating that the fluctuating method was permitted under current law. The remarks were made while the legislature considered adopting the formula for calculating the regular rate of certain delivery drivers and sales merchandisers. See General Statutes § 31-76b (1). The department representative testified concerning an earlier version of the bill, indicating that an employer's use of the fluctuating method was lawful, and stating, "certainly we'd be happy to speak to the fact that what is being done presently is not outside of the law. If it was, [the department] would have been doing something about it." Conn. Joint Standing Committee Hearings, Labor and Public Employees, Pt. 3, 2003 Sess., p. 992, remarks of John McCarthy, Connecticut Department of Labor Representative.

The parties have not relied on these remarks,, and they have not impacted our interpretation of the wage order. The representative did not provide any analysis or explanation for his opinion, or indicate whether he was referencing federal or state law, or both. Nor did he specifically mention the mercantile wage order or whether it allowed the fluctuating method. Even if we were to assume his opinion related to the wage order, we do not accord deference to an agency interpretation that is not adopted formally through the agency's rule-making process or adjudicative procedure. See, e.g., *Sarrazin* v. *Coastal, Inc.*, supra, 311 Conn. 608–11 and n.19 (no deference given to department interpretation expressed in guidebook established for employers and employees). In addition, we are not aware of any authority that would justify our reliance on an agency representative's remarks to the legislature to modify the plain meaning of a previously promulgated agency regulation. In fact, we ordinarily apply a presumption against finding an implicit repeal or modification of a regulation. See *Amaral Bros., Inc.* v. *Dept. of Labor*, 325 Conn. 72, 85, 155 A.3d 1255 (2017).

[10] In the present case, the plaintiffs claim their usual work week was forty hours. This presents a question of fact for the District Court to address.

as actual, straight time pay.[11] The wage order's command to use a divide by usual hours method therefore precludes use of the fluctuating method's divide by actual hours method, except, of course, when an employee's actual hours match his usual hours.

IV

In sum, we conclude that, although Connecticut's wage laws do not preclude use of the fluctuating method, the plain meaning of the text in the wage order does.

We answer the certified question, "No."

No costs shall be taxed in this court to any party.

In this opinion the other justices concurred.

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[11] Here is an illustration of this calculation. Suppose an employee who usually works forty hours per week actually worked fifty hours in a week, and earned $400 base pay, plus an additional $100 in commissions, for a total weekly pay of $500. In this scenario, the employee's regular hourly rate for the purpose of calculating overtime is $12.50 per hour ($500/40 usual hours). This differs from his actual rate of pay, which was $10 per hour ($500/50 actual hours). The employee must be compensated at least $18.75 for each overtime hour worked ($12.50 x 1.5). Because the employer has already paid the employee at a rate of $10 for each hour worked, including overtime hours, the employee needs an additional $8.75 for each overtime hour to bring him to $18.75 per hour for each overtime hour. His additional overtime pay is $87.50 ($8.75 x 10 hours of overtime).