# THE BRAIN EATING AMOEBA AND THE OUTER LIMITS OF TORT LIABILITY

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In 2009, Ken and Lloyd represented, respectively, a city and the State of Arizona in a case in which a 15 year old boy minor swam in an Arizona river and died less than one week later due to an infection by an amoeba, naegleria fowleri (N. fowleri), first identified in Australia. The amoeba is fairly common and exists worldwide in untreated, warm, fresh water when the ambient temperature is high and can cause Primary Amoebic Meningoencephalitis (PAM), a very rare but seems to be always fatal disease.

There is no known survivor of an attack of this amoeba. It appears to either do no harm (the overwhelming majority of the time) or kill - in rare instances. It is so rare it is usually initially misdiagnosed. But delay associated with misdiagnosis apparently makes no difference as no known cure exists.

It appears the amoeba must enter the brain the through the nose, migrating to the brain via the olfactory nerve, where it destroys brain tissue. Researchers suggest younger boys are more at risk as they are more likely to disturb lake or river mud deposits in the 15 southern tier States, a favorite habitat of the amoeba. Young boys, "horsing around" may also be more likely to cause water to forcefully enter the nose, the only known entry way into the body through which the amoeba can cause harm.

A total of only 121 cases of PAM have been reported in the United States during the 70 years of 1937 through 2007. The amoeba is difficult to detect or measure, but the risk of developing PAM from fresh water has been estimated to range from one case per 1 million to 2.6 million exposures and the odds of a PAM death one in 37,063,383. The only certain way to prevent the amoeba infection is to refrain from fresh water related activities. After limited discovery, the defendants filed a Motion for Summary Judgment arguing that there simply was no negligence by either the City or State; the plaintiff stipulated to a dismissal with prejudice.

Since the 1990's Arizona Courts have recognized the obligation of the Court to refuse to permit the jury to consider the case in which the risk was simply not unreasonable as a matter of law. The Courts have called themselves the "gatekeeper" of the "outer limits" of negligence.

Because negligence is defined as a breach of a duty to prevent foreseeable risk of unreasonable harm, no liability can attach when the risk is not unreasonable as a matter of law. In *Rogers v. Retrum*, 170 Ariz. 399, 825 P.2d 20 (App. 1991), a high school student sued the school district and teacher to recover damages for injuries sustained in an accident while riding in a friend's car after the friend became angry with the teacher and left the school building. The Court affirmed summary judgment because plaintiff's injury did not result from an unreasonable risk that may be charged to the conduct of the defendants and stated at page 402:

*Not every foreseeable risk is an unreasonable risk. It does not suffice to establish liability to prove (a) that defendant owed plaintiff a duty of reasonable care; (b) that an act or omission of defendant was a contributing cause of injury to plaintiff; and (c) that the risk of injury should have been foreseeable to defendant. The question whether the risk was unreasonable remains. This last question merges with foreseeability to set the scope of the duty of reasonable care [citations omitted.] ("The inquiry into the scope of duty is concerned with exactly the same factors as is the inquiry into whether conduct is unreasonably dangerous (i.e., negligent).").*

To decide whether a risk was unreasonable requires an evaluative judgment ordinarily left to the jury. "Summary judgment is generally not appropriate in negligence actions. [Citation omitted.] However, in approaching the question of negligence or unreasonable risk, the courts set outer limits. A jury will not be permitted to require a party to take a precaution that is clearly unreasonable . . . . Thus, for example, the jury may not require a train to stop before passing over each grade crossing in the country. [Citation omitted.]

Other Arizona cases addressing the outer limits are: *Graffiti-Valenzuela v. City of Phoenix*, 216 Ariz. 454, 167 P.3d 711 (App. 2007) (Although City had duty to bus passengers, City not liable as no unreasonable risk created by not lighting bus stop); *Patterson v. Thunder Pass, Inc.*, 214 Ariz. 435, 153 P.3d 1064 (App. 2007) (Tavern owner did not create unreasonable risk for injuries occurring after Tavern owner escorted patron home); *Hislop v. Salt River Project*, 197 Ariz. 553, 5 P.3d 267, App. 2000) (In finding damages for emotion distress caused by witnessing harm to another could not be obtained by a co-worker, court said: "[w]e are cautioned, correctly, that in descrying the outer limits for negligence, we should not attempt to mask the policy aspects inherent in such a decision."); *Hill v. Stafford Unified School District*, 191 Ariz. 110, 952 P.2d 754 (App. 1997)(School did not create unreasonable risk as a matter of law for a student shooting occurring off campus); *Estes v. Tripson*, 188 Ariz. 93, 932 P.2d 1364 (1997) (Court found as matter of law no unreasonable risk for participants in a softball game when one of the participants is injured); *Bell v. Smitty's Super Value*, Inc., 183 Ariz. 66, 900 P.2d 15, (App. 1995) (Court held that outer limits inquiry would not permit case to go to jury where a store customer used bullets in a weapon store could not reasonably have foresee); *Davis v. Cessna*, 182 Ariz. 26, 893 P.2d 26 (App. 1994) (trial court functions as "gatekeeper" to preempt the question of unreasonable risk going to the jury as the standard of reasonable care did not require APS to make its system perfectly safe by marking the subject power line crossing so that it might be more visible to a pilot who might choose to make an emergency landing at that location); *Bellezzo v. State*, 174 Ariz. 548, 851 P.2d 847, (App. 1992) (Court decided no unreasonable risk created as a matter of law for injuries suffered when spectator struck in the head by a foul ball at a baseball game).

This was a tragic case, as is the death of any child. But it points out that sometimes things can happen and no one has fault.