

COMMON LAKE ORGANISM FATAL TO PARK VISITOR

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Negligence liability is generally based upon an unreasonably dangerous condition that causes injury. Foreseeability is a key consideration in determining liability for negligence. Foreseeability is a probability, not a mere possibility. Based on one's own actual knowledge or the common understanding of those similarly situated, how have individuals been injured in the past?

In light of the injury causing propensity and frequency of a given situation in the past, what preventative measures would reasonable persons be expected to take to mitigate the foreseeable risk of future injuries? On the other hand, if an injury is truly unforeseeable, reasonable persons would not be expected to take any precautions or preventative measures to avoid negligence liability.

AMOEBIC BRAIN INFECTION

In the case of *Daviess-Martin Cty. Joint Parks & Recreation Department v. Estate of Abel*, 77 N.E.3d 1280 (Ind.App. 6/19/2017), Waylon Abel died after being infected by a common water borne organism while swimming in a park lake. Abel's estate (the Estate) claimed the Parks Department, along with the Park Board, County and Health Department, were negligent in failing to reasonably address the threat posed to park visitors by harmful organisms in the park swimming lake.

On July 15, 2012, Abel was a visitor to West Boggs Park, a 1,500-acre recreation area that includes a 622-acre lake. The Park is jointly owned by Daviess County and Martin County. The park property is governed by and through the Parks Board. According to the Estate, Abel died after being exposed to an amoeba, *Naegleria fowleri*, while swimming in the lake. This amoeba then can cause primary amoebic meningoencephalitis ("PAM"), a brain infection that leads to the destruction of brain tissue. The fatality rate is over 97%.

There is only one known way for the amoeba to infect a human. Water containing the amoeba must forcefully enter the nasal passage and reach the olfactory nerve, which is located at the very top of the nasal canal, just beneath the brain. The risk of a *Naegleria fowleri* infection is extremely rare. Between 1962 and 2013, only 132 people in the United States were diagnosed with PAM despite millions of recreational water exposures each year.

In June 2014, the Estate filed a complaint against the Parks Board, Martin County, Indiana, the Martin County Health Department, and the State of Indiana. The Estate alleged that the defendants were negligent for failing to protect the public from injury. Specifically, the Estate alleged defendants were negligent in the following:

- (1) failing to test the water of West Boggs Lake to determine the existence of harmful organisms in the water, including but not limited to *Naegleria fowleri*;

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(2) failing to properly maintain West Boggs Lake in a manner permitting safe swimming; (3) failing to warn the public of a dangerous condition at West Boggs Lake; (4) failing to warn the public of the existence of *Naegleria fowleri* in the water.

### CENTERS FOR DISEASE CONTROL

In response, the defendants filed motions for summary judgment, claiming they owed no duty to protect Abel under these circumstances. In so doing, the trial court was presented with documents from the Centers for Disease Control and Prevention ("CDC") indicating there was "no routine or rapid test for the presence of *Naegleria fowleri*." Further, the CDC had noted no method currently exists that accurately and reproducibly measures the numbers of amoebae in the water.

In general, CDC does not recommend testing untreated rivers and lakes for *Naegleria fowleri* because the amoeba is naturally occurring and there is no established relationship between detection or concentration of *Naegleria fowleri* and risk of infection. "There are no means yet known that would control natural *Naegleria fowleri* levels in lakes and rivers.

In light of this CDC information, the defendants claimed it was "unclear how a standard might be set to protect human health and how public health officials would measure and enforce such a standard."

As noted in the CDC information, "recreational water users should assume that there is a low level risk when entering all warm freshwater, particularly in southern-tier states." Further, based upon the following, the CDC documentation acknowledged that posting warning signs "based on finding *Naegleria fowleri* in the water is unlikely to be an effective way to prevent infections":

*Naegleria fowleri* occurrence is common, infections are rare.

The relationship between finding *Naegleria fowleri* in the water and the occurrence of infections is unclear.

The location and number of amoebae in the water can vary over time within the same lake or river.

There are no rapid, standardized testing methods to detect and quantitate *Naegleria fowleri* in water.

Posting signs might create a misconception that bodies of water without signs or non-posted areas within a posted water body are *Naegleria fowleri*-free.

The Estate, however, claimed that CDC had recommended warning the public: "whenever they enter a warm freshwater body they should assume an amoeba is present." As a result, based upon this CDC recommendation, the Estate argued full trial proceedings were necessary to determine whether reasonable care under the circumstances in this particular situation required a "warning about the presence and risks of *Naegleria fowleri*." Further, the Estate maintained the trial court should have allowed additional pretrial discovery proceedings to "determine the defendants' actual knowledge about *Naegleria fowleri* and that they should have known

*Naegleria fowleri* was present in the lake." The trial court agreed and denied defendants' motions for summary judgment, but granted the defendants' request for an immediate appeal.

On appeal, the issue was whether the trial court had erred in denying defendants' motions for summary judgment because no duty was owed to protect Abel under the circumstances of this case. As noted by the appeals court, summary judgment should be granted only if the undisputed evidence clearly shows "there is no genuine issue of material fact and that the moving party deserves judgment as a matter of law." In other words, further trial proceedings were unnecessary because the pretrial evidence in this particular case conclusively established that defendants owed no legal duty to protect Abel against amoebas in the lake.

#### UNREASONABLE RISK OF HARM?

As cited by the appeals court, to prevail on a negligence claim, "a plaintiff must prove that the defendant or defendants: (1) owed him a duty, (2) breached that duty, and (3) proximately caused his injury." Moreover, in determining whether a duty exists, the court would consider "the relationship between the parties" and "the reasonable foreseeability of harm." Further, in determining whether an act is foreseeable, the court would "assess whether there is some probability or likelihood of harm that is serious enough to induce a reasonable person to take precautions to avoid it."

In general, the appeals court acknowledged: "Governmental units have a long-recognized duty to maintain a public recreational facility in a reasonably safe manner." Reasonably safe, however, would not mean risk free. By virtue of their gaining access to public recreational facilities, park visitors ("invitees") would necessarily assume the unavoidable and inherent risks associated with potential exposure to indigenous flora and fauna on the premises while engaging in outdoor activities.

In this particular instance, the appeals court acknowledged: "Daviness County is a landowner of West Boggs Park, and the Parks Board is the operator of the Park." In determining "whether the County, Parks Board, or the Health Department owed a duty to Abel," the appeals court indicated it would "engage in the standard analysis regarding a landowner's duty to an invitee for a condition of the land." In so doing, the appeals court would apply the Restatement (Second) of Torts section 343, which provides:

- A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
- (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
- (c) fails to exercise reasonable care to protect them against the danger.

Accordingly, in applying Restatement Section 343, the appeals court would "first focus on whether the County and Parks Board knew or by the exercise of reasonable care would have discovered the condition and should have realized that it involved an unreasonable risk of harm

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to invitees."

As noted by the appeals court, the Estate had admitted that there are currently no known methods of eradicating or controlling amoeba in lakes. Regardless, the Estate argued "the County and the Parks Board knew or should have known by the exercise of reasonable care that *Naegleria fowleri* was present in the lake." Further, the Estate argued the County and the Parks Board "should have followed the CDC recommendation that recreational users of warm water bodies of water across the U.S. should be warned about the de facto presence of the Amoeba in the water, its risks, and precautions necessary to protect themselves against infection."

In response, the County claimed "the potential presence of *Naegleria fowleri* was never brought to the attention of the County's Board of Commissioners or "otherwise contemplated during Board meetings prior to Abel's death":

Prior to August 7, 2012, the Parks Board Superintendent had never heard of *Naegleria fowleri*. The County did not conduct any water testing at the lake; rather, the Parks Board, which operated the Park for the County, did so. The Parks Board oversees the lake operations, including compliance with the applicable health and environmental regulations governed by Federal, State, and local officials. It routinely tests the water as required by the Indiana State Department of Health, but those requirements do not include testing for *Naegleria fowleri*.

### NO PUBLIC HEALTH STANDARD

According to the defendants, information from the CDC conclusively established that there is "no routine or rapid test for the presence of *Naegleria fowleri*." Moreover, defendants claimed "no method currently exists that accurately and reproducibly measures the numbers of amebae in the water." Based on this evidence from the CDC, defendants maintained "it was unclear how a standard might be set to protect human health and how public health officials would measure and enforce such a standard."

Under these circumstances, the appeals court found no evidence that "the County or the Parks Board knew or by the exercise of reasonable care would have discovered the existence of the *Naegleria fowleri* or realized that it involved an unreasonable risk of harm to invitees." On the contrary, the appeals court found pretrial evidence indicated "a PAM infection, especially in Indiana, is very rare." In fact, the appeals court noted "Abel was the first known PAM infection in Indiana's history."

Accordingly, in the opinion of the appeals court, the County and Parks Board did not owe Abel a duty to test the lake water because there was "no rapid, standardized testing method to detect and quantitate *Naegleria fowleri*." Moreover, even if the County or the Parks Board had tested for *Naegleria fowleri*, there was "no quantifiable relationship between finding *Naegleria fowleri* in the water and predicting the occurrence of the PAM infection."

In general, CDC does not recommend testing untreated rivers and lakes for *Naegleria fowleri* because the amoeba is naturally occurring and there is no

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established relationship between detection or concentration of *Naegleria fowleri* and risk of infection. According to the CDC, recreational water users should assume that there is a low level risk when entering all warm freshwater, particularly in southern-tier states. There are no means yet known that would control natural *Naegleria fowleri* levels in lakes and rivers.

### REASONABLY FORESEEABLE?

In reaching this determination, the appeals court also considered "whether it was reasonably foreseeable for a lake owner/operator to expect a swimmer to contract a PAM infection." Moreover, in determining whether Abel was owed a legal duty of care, the appeals court would consider the "broad type of plaintiff" and the "broad type of harm" to determine if a "reasonable persons would recognize it and agree that it exists." In so doing, the appeals court would determine whether "there had been no known Indiana PAM infections" prior to Abel's death. In the opinion of the appeals court, "it was not reasonably foreseeable that Abel would contract a PAM infection":

Out of millions of recreational swimming water exposures each year, only 132 people were diagnosed with the infection between 1962 and 2013. Even if a swimmer is exposed to *Naegleria fowleri*, the likelihood of contracting the PAM infection is rare. The majority of those infections were found in southern states.

As a result, the appeals court held "the County and the Parks Board did not owe a duty to Abel" and the trial court had erred when it denied the County's and the Parks Board's motions for summary judgment.

### PUBLIC HEALTH CONCERNS

The appeals court also reviewed the Estate's complaint against the defendant Health Department. Under state law, a local health department had the authority and responsibility to control communicable diseases. That being the case, an environmental health specialist for the County had indicated the Health Department's primary purposes was "to ensure the safe preparation of food for county residents and the sanitary installation and operation of septic systems." As a result, any water testing at the lake was conducted by the Parks Board, not the Health Department. Moreover, the environmental health specialist had noted that "at no time during his education, training, certification, or continuing education had he heard *naegleria fowleri* mentioned, discussed, cautioned against or otherwise stated."

In determining whether the Health Department owed Abel a legal duty of care, the appeals court would once again consider: (1) the relationship between the parties, (2) the reasonable foreseeability of harm, and (3) public policy concerns.

As was the case with the County and Park Board, the appeals court found no "reasonable foreseeability of harm" which would impose a legal duty of care owed to Abel under the circumstances of this particular case. Further, in the opinion of the appeals court, Abel's death did not give rise to any public policy concerns which would justify the imposition of a legal

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burden and duty of care to require warnings and/or conduct testing for the presence of *Naegleria fowleri* in the lake.

As for public policy, given that the PAM infection is extremely rare, the infection is due to an amoeba that is comparable to a wild animal, there is no rapid, standardized testing method for the presence of *Naegleria fowleri*, and there is no known treatment available for lake water, we do not believe that a blanket imposition of "duty" under these circumstances promotes public policy.

While recognizing "the circumstances here were tragic," the appeals court nonetheless held "the County, Parks Board, and Health Department did not have a duty to Abel." The appeals court, therefore, ordered the trial court to enter summary judgment in favor of the Defendants County, Parks Board and Health Department.

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Virtual visit to West Boggs Lake on YouTube:

Boggs Lake

<https://www.youtube.com/watch?v=QvPpUxC0NOw>

First responders rescue man from West Boggs Lake

<https://www.youtube.com/watch?v=24smQLWGcJk>

Electrofishing Indiana DNR

<https://www.youtube.com/watch?v=fHfwaVtJH80>

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