MOTORIST DROWNS IN RETENTION POND ADJACENT TO HIGHWAY

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Based upon conversations with many park and recreation administrators, it appears that there is widespread concern over liability for natural or manmade bodies of water on the premises. Many administrators ask if they must fence or provide other types barriers around such bodies of water. Generally, the danger of drowning in a natural body of water is considered an open and obvious hazard which anyone old enough to be at large is expected to know, appreciate, and avoid. As a result, there is usually no legal duty to guard, warn, or make such open and obvious hazards safe. The *Kavanaugh* case described herein presents a variation on this principle as it relates a body of water adjacent to a highway.

FORESEEABLY DEVIATE FROM ROADWAY

In the case of *Kavanaugh v. Midwest Club Inc.* Ill.App., 517 N.E.2d 656 (1987), plaintiff Marianne Kavanaugh's husband, Thomas, drowned in a retention pond on property owned by defendant Midwest Club, Inc. The facts of the case were as follows:

> On November 29, 2984, Mr. Kavanaugh was driving a vehicle east on 31st Street in the Village of Oak Brook. Midwest Club owned and maintained a retention pond located in the vicinity of 31st Street and Midwest Road. After Kavanaugh suffered an epileptic seizure, his vehicle left the roadway, entered the retention pond, and became completely submerged.
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> Thereafter, an off-duty security guard of Midwest Club telephoned Oak Brook police department and informed them of the incident. Several officers were dispatched to the scene, none of whom carried the equipment to perform underwater rescue.
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> Upon their arrival at the scene, the officers unsuccessfully attempted to rescue Kavanaugh who was still alive, from his submerged vehicle. After the failed attempt, the Oak Brook police department requested assistance from the Lisle-Woodridge Recovery Team. The subsequent rescue efforts were also unsuccessful.

Kavanaugh alleged that "Midwest Club owed a duty of reasonable care for the safety" of her husband. Specifically, Kavanaugh argued that Midwest owed her husband a legal duty of care "to maintain and guard the retention pond because it was foreseeable that a motor vehicle, in its ordinary course of travel, could leave the roadway and enter the pond." In her complaint, Cavanaugh alleged that Midwest "was negligent by failing to erect guards or barriers around the retention pond, by failing to design the retention pond in a safe manner, by locating the retention pond too close to 31st Street, and by failing to erect a fence between the retention pond and 31st Street."

Midwest maintained that "public policy considerations compel a finding of no duty requiring a landowner to prevent vehicles from coming in contact with natural or artificial conditions located near a roadway." The trial court agreed and dismissed Kavanaugh's claim against Midwest. Midwest appealed.

As noted by the appeals court, the following general legal principles would determine negligence liability.

> To be legally sufficient, a complaint for negligence must set out facts that establish the existence of a duty owed by defendant to plaintiff, a breach of the duty, and an injury proximately caused by the breach. The determination of whether a duty exists is an issue of law to be determined by the court. Reasonable foreseeability of harm is a key concern in determining whether a duty exists, although the court should also consider the likelihood of injury, the magnitude of the burden of guarding against it and the consequences of placing the burden on defendant.

According to the appeals court, the specific issue to be addressed in this case was "the duty owed by an owner or occupant of land to the occupant of a motor vehicle to protect against the harm resulting from the vehicle leaving the roadway and coming in contact with an artificial [i.e. manmade] condition adjacent to the roadway." In opinion of the appeals court, the applicable legal duty under the circumstances of this case would be governed by section 368 of the *Restatement (Second) of Torts.* As described by the appeals court this section provided as follows:

> A possessor of land who creates or permits to remain thereon an excavation or other artificial condition so near an existing highway that he realizes or should realize that it involves an unreasonable risk to others accidentally brought into contact with such condition while traveling with reasonable care upon the highway is subject to liability for physical harm thereby caused to persons who (a) are traveling on the highway, or (b) foreseeably deviate from it in the ordinary course of travel.
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> For a duty to attach, the person to whom it is owed must foreseeably deviate from the roadway in the ordinary course of travel. The complaint must allege facts that demonstrate that the condition of the roadway is such that a vehicle is likely to deviate from it in the ordinary course of travel and come into contact with the artificial condition. The distinction is thus not one between inadvertent and intentional deviations, but between those which are normal incidents of travel and those which are not.

Applying these principles to the facts of the case, the appeals court found that Kavanaugh had failed "to allege facts to create a duty."

> In the instant case, Kavanaugh argues that Midwest Club owed her deceased husband a duty to protect him from injury because it was reasonably foreseeable

> that a vehicle would deviate from its ordinary course of travel on 31st Street and enter the retention pond. The complaint, however, sets forth no allegations as to why the location of the retention pond involves an unreasonable risk beyond the fact that it was in the vicinity of 31st Street. There were no allegations, for example, that the pond was located near a sharp curve in the roadway or opposite a "T" intersection in the roadway which might make it likely that a vehicle would deviate from the roadway in the ordinary course of travel and come into contact with the pond. The bare allegation that Midwest Chub happened to locate its retention pond "in the vicinity of" this particular stretch of roadway, by itself, without an allegation of a condition peculiar to the roadway, does not create a duty to protect the occupants of vehicles which, by happenstance, or, as is the case here, when the driver has an epileptic seizure, leaves the roadway and enters the pond...
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> Based on the pleadings in this case, it would be unreasonable to impose a duty upon Midwest Club, which located a retention pond "in the vicinity of" 31st Street, to implement the precautions necessary to prevent vehicles, that might leave the roadway for any number of reasons, from entering the retention pond. In addition, Kavanaugh's failure to allege any condition of the roadway that is likely to cause a vehicle to deviate therefrom in the ordinary course of travel and to come in contact with the artificial condition, there are no allegations of where the retention pond was in relation to 31st Street. Distance from the highway is frequently decisive, since those who deviate in any normal manner in the ordinary course of travel cannot reasonably be expected to stray very far.

MUNICIPAL DUTY TO RESCUE

Kavanaugh also brought suit against the Village of Oak Brook, alleging that "the Village, upon dispatching the police officers to the scene of the incident, voluntarily undertook to rescue Kavanaugh and assumed the duty to perform the rescue without negligence." Further, Kavanaugh alleged that Oak Brook "was negligent in delaying the arrival of trained water rescue personnel and by dispatching personnel with no diving or water rescue gear and no training in water rescue." Oak Brook responded that "it cannot be liable for failing to furnish a governmental service such as police protection and rescue services." The trial court agreed and dismissed Kavanaugh's claim against the Village of Oak Brook. Kavanaugh appealed.

The appeals court acknowledged that, generally, "a municipality is not liable for its failure to supply police protection except where the municipality is under a special duty to a particular individual." Similarly, the appeals court cited the state tort immunity statute (section 4-102 of the Tort Immunity Act) which provided in pertinent part: "Neither a local public entity nor a public employee is liable... for failure to provide adequate police protection or service." Further the court noted that earlier state court decisions had held that "a municipality has no duty to rescue another in distress where no rescue was attempted."

In the opinion of the appeals court, the statutory immunity cited above "for failure to provide adequate police protection or service includes the services alleged to have been undertaken by the Oak Brook police officers."

While the case law in Illinois has generally examined the immunity granted in section 4-102 in the context of the traditional police role of law enforcement, police protection and the apprehension of criminals, we conclude that the phrase "adequate police protection or service in section 4-102 includes the police function of responding to a call of a traffic matter involving a motor vehicle that had been driven off the roadway and into a nearby retention pond, as alleged here. Police service, in this context, may also include police aid, assistance, or rescue. Because these functions are commonly recognized as an important part of police services, we believe that the legislature intended to grant immunity for this type of service as well as for police protection.

As in the case of police protection, where the legislature has granted immunity from inadequate police action on public policy considerations that a police department's negligence, oversights, blunders or omissions are not the proximate [i.e. legal] cause of harm committed by others, we conclude that this same public policy consideration is present here, where the police responded to a call for assistance in a traffic matter.

According to the appeals court, municipalities are generally immune for negligent general police protection because "the duty of police to preserve a community's well-being and to prevent the commission of crimes is owed to the public at large, not to specific individuals." However, as noted by the appeals court, "an exception arises where the police have assumed a special relationship or are under a special duty to an individual which elevates his status beyond that of a member of the general public." As described by the appeals court, the following four elements "comprise this special duty exception" to police protection immunity:

> (1) the municipality must be uniquely aware of the particular danger or risk to which plaintiff is exposed; (2) there must be allegations of specific acts or omissions on the part of the municipality; (3) the specific acts or omissions must be either affirmative or willful in nature; and (4) the injury must occur while plaintiff is under the direct and immediate control of employees or agents of the municipality.

Applying these principles to the facts of the case, the appeals court found that Kavanaugh had failed to establish a special relationship between her husband and the village police.

> Even assuming Kavanaugh has satisfied the first three requirements, Kavanaugh has made no allegations which lead to the conclusion that the death of her husband occurred while he was under the direct and immediate control of the Oak Brook police officers. Rather, Kavanaugh alleges that the police attempted to rescue her husband, but were unable to do so because of a lack of trained water rescue personnel and water rescue gear. Thus, the complaint fails to show a "special duty" relationship between the parties.

As a result, the appeals court concluded that police protection immunity applied and the trial court properly dismissed Kavanaugh's complaint against Oak Brook. The appeals court, therefore, affirmed the judgment of the trial court dismissing Kavanaugh's claims against defendants Midwest Club and the Village of Oak Brook.