SYRACUSE UNIVERSITY

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Dear Admitted Students:

Congratulations on your admission to the College of Law! It is my pleasure to lead your mock class experience. The class is designed to give you a feel for the type of discussions that occur in a typical first-year class.

In order to simulate an authentic experience, I ask that those wishing to attend the class read the attached two cases in advance. These cases are among those students in my torts class read during their first semester of law school. We will discuss them as part of the session.

I look forward to meeting you.

Sincerely,

Nina A. Kohn
David M. Levy Professor of Law

Case #1:

Yania v. Bigan
155 A.2d 343 (Pa. 1959)

BENJAMIN R. JONES, Justice.

A bizarre and most unusual circumstance provides the background of this appeal.

On September 25, 1957 John E. Bigan was engaged in a coal strip-mining operation in Shade Township, Somerset County. On the property being stripped were large cuts or trenches created by Bigan when he removed the earthen overburden for the purpose of removing the coal underneath. One cut contained water 8 to 10 feet in depth with side walls or embankments 16 to 18 feet in height; at this cut Bigan had installed a pump to remove the water.

At approximately 4 p. m. on that date, Joseph F. Yania, the operator of another coal strip-mining operation, and one Boyd M. Ross went upon Bigan's property for the purpose of discussing a business matter with Bigan, and, while there, were asked by Bigan to aid him in starting the pump. Ross and Bigan entered the cut and stood at the point where the pump was located. Yania stood at the top of one of the cut's side walls and then jumped from the side wall--a height of 16 to 18 feet--into the water and was drowned.

Yania's widow, in her own right and on behalf of her three children, instituted wrongful death and survival actions against Bigan contending Bigan was responsible for Yania's death. . . . The court below sustained the preliminary objections. . . .

The complaint avers negligence in the following manner: (1) 'The death by drowning of [Yania] was caused entirely by the acts of [Bigan] in *urging, enticing, taunting and inveigling* [Yania] to jump into the water, which [Bigan] knew or ought to have known was of a depth of 8 to 10 feet and dangerous to the life of anyone who would jump therein' (emphasis supplied); (2) [Bigan] violated his obligations to a business invitee in not having his premises reasonably safe, and not warning his business invitee of a dangerous condition and to the contrary urged, induced and inveigled [Yania] into a dangerous position and a dangerous act, whereby [Yania] came to his death'; (3) 'After [Yania] was in the water, a highly dangerous position, having been induced and inveigled therein by [Bigan], [Bigan] failed and neglected to take reasonable steps and action to protect or assist [Yania], or extradite [Yania] from the dangerous position in which [Bigan] had placed him.' Summarized, Bigan stands charged with three-fold negligence: (1) by urging, enticing, taunting and inveigling Yania to jump into the water; (2) by failing to warn Yania of a dangerous condition on the land, i. e. the cut wherein lay 8 to 10 feet of water; (3) by failing to go to Yania's rescue after he had jumped into the water. . . .

Our inquiry must be to ascertain whether the well-pleaded facts in the complaint, assumedly true, would, if shown, suffice to prove negligent conduct on the part of Bigan.

Appellant initially contends that Yania's descent from the high embankment into the water and the resulting death were caused 'entirely' by the spoken words and blandishments of Bigan delivered at a distance from Yania. The complaint does not allege that Yania slipped or that he was pushed or that Bigan made any *physical* impact upon Yania. On the contrary, the only inference deducible from the facts alleged in the complaint is that Bigan, by the employment of cajolery and inveiglement, caused such a *mental* impact on Yania that the latter was deprived of his volition and freedom of choice and placed under a compulsion to jump into the water. Had Yania been a child of tender years or a person mentally deficient then it is conceivable that taunting and enticement could constitute actionable negligence if it resulted in harm. However,

to contend that such conduct directed to an adult in full possession of all his mental faculties constitutes actionable negligence is not only without precedent but completely without merit. . . .

Appellant next urges that Bigan, as the possessor of the land, violated a duty owned to Yania in that his land contained a dangerous condition, i. e. the water-filled cut or trench, and he failed to warn Yania of such condition. Yania was a business invitee in that he entered upon the land for a common business purpose for the mutual benefit of Bigan and himself . . .. As possessor of the land, Bigan would become subject to liability to Yania for any physical harm caused by any artificial or natural condition upon the land (1) if, and only if, Bigan knew or could have discovered the condition which, if known to him he should have realized involved an unreasonable risk of harm to Yania, (2) if Bigan had to reason to believe Yania would discover the condition or realize the risk of harm and (3) if he invited or permitted Yania to enter upon the land without exercising reasonable care to make the condition reasonably safe or give adequate warning to enable him to avoid the harm. . . . The inapplicability of this rule of liability to the instant facts is readily apparent.

The *only* condition on Bigan's land which could possibly have contributed in any manner to Yania's death was the water-filled cut with its high embankment. Of this condition there was neither concealment nor failure to warn, but, on the contrary, the complaint specifically avers that Bigan not only requested Yania and Boyd to assist him in starting the pump to remove the water from the cut but 'led' them to the cut itself. If this cut possessed any potentiality of danger, such a condition was as obvious and apparent to Yania as to Bigan, both coal strip-mine operators. Under the circumstances herein depicted Bigan could not be held liable in this respect.

Lastly, it is urged that Bigan failed to take the necessary steps to rescue Yania from the water. The mere fact that Bigan saw Yania in a position of peril in the water imposed upon him no legal, although a moral, obligation or duty to go to his rescue unless Bigan was legally responsible, in whole or in part, for placing Yania in the perilous position. . . . That his undertaking was an exceedingly reckless and dangerous one, the event proves, but there was no one to blame for it but himself. He had the right to try the experiment, obviously dangerous as it was, but then also upon him rested the consequences of that experiment, and upon no one else; he may have been, and probably was, ignorant of the risk which he was taking upon himself, or knowing it, and trusting to his own skill, he may have regarded it as easily superable. But in either case, the result of his ignorance, or of his mistake, must rest with himself--and cannot be charged to the defendants. The complaint does not aver any facts which impose upon Bigan legal responsibility for placing Yania in the dangerous position in the water and, absent such legal responsibility, the law imposes on Bigan no duty of rescue.

Recognizing that the deceased Yania is entitled to the benefit of the presumption that he was exercising due care and extending to appellant the benefit of every well pleaded fact in this complaint and the fair inferences arising therefrom, yet we can reach but one conclusion: that Yania, a reasonable and prudent adult in full possession of all his mental faculties, undertook to perform an act which he knew or should have known was attended with more or less peril and it was the performance of that act and not any conduct upon Bigan's part which caused his unfortunate death.

Order affirmed.

Case #2:

Florence v. Goldberg
375 N.E. 2d 763 (NY 1978)

JASEN, Judge.

This appeal raises the issue whether a municipality may be held liable for injuries suffered by an infant struck by an automobile while attempting to negotiate a school crossing where the municipality's police department, having voluntarily assumed a duty to supervise school crossings an assumption upon which the infant's parent relied negligently omitted to station a guard at one of the designated crossings.

On November 14, 1967, Darryle Davis, a 6 1/2 -year-old infant, was struck by a taxicab, the impact of which resulted in the infliction of severe brain damage to the infant. At the time of the injury, the infant plaintiff was a first-grade student at Public School 191, located on Park Place between Ralph and Buffalo Avenues in Brooklyn. Although he resided on Park Place, only one block away from the school, the infant plaintiff was required to cross Ralph Avenue to attend school.

Prior to the occurrence of the accident resulting in the infant's injury, a civilian school crossing guard had been assigned regularly to cover the intersection of Park Place and Ralph Avenue, a busy two-way street. For the first two weeks of class, a period throughout which the infant's mother accompanied her son to and from school, a crossing guard had been stationed at the intersection of Park Place and Ralph Avenue. Having witnessed the daily presence of a crossing guard at this intersection, the infant's mother, who accepted employment two weeks after her son started class, felt confident that she need not arrange for someone to provide a similar service for her child.

Tragically, however, on the day in question no crossing guard was stationed at the intersection of Park Place and Ralph Avenue. The regularly assigned crossing guard, having felt ill that day, notified the 77th precinct at 7:30 a. m. that she would not be able to report for duty. . . . Upon receiving notification of the crossing guard's unavailability for duty, the police department neither assigned a patrolman to substitute for the crossing guard nor notified the school principal of the absence of a crossing guard at the Park Place and Ralph Avenue intersection. It was shortly after 11:45 a. m., while the infant plaintiff was returning home from school, that he was struck by a taxicab while attempting to cross this intersection.

The infant's mother, as natural guardian, commenced this action against New York City, Lilly Transportation Corp., the owner of the taxicab, and Meyer Goldberg, the operator of the vehicle, seeking damages for the personal injuries suffered by the infant. She also sought, in a derivative cause of action, damages for loss of the infant's services and medical expenses. At trial, the action was discontinued against Goldberg.

The jury returned a verdict against Lilly and New York City, apportioning the liability between them in the ratio of 25% against Lilly and 75% against the city. . . . On appeal, the Appellate Division, holding the award to the infant's mother excessive, ordered a new trial on the issue of damages unless plaintiff agreed to accept a reduction to $125,000. Plaintiff having so stipulated, the Appellate Division affirmed the judgment of the trial court.

On appeal to this court, the City of New York contends that a municipality acting in its governmental capacity to protect the public from external hazards cannot be held liable in damages for its failure to furnish adequate protection. We hold that a municipality whose police department voluntarily assumes a duty to supervise school crossings the assumption of that duty having been relied upon by parents of school children may be held liable for its negligent omission to provide a guard at a designated crossing or to notify the school principal or take other appropriate action to safeguard the children.

. . .[T]o sustain liability against a municipality, the duty breached must be more than a duty owing to the general public. There must exist a special relationship between the municipality and the plaintiff, resulting in the creation of "a duty to use due care for the benefit of particular persons or classes of persons" . . .. For example, as a general rule, a municipality's duty to furnish water to protect its residents against damage caused by fire is a duty inuring to the benefit of the public at large, rather than to the individual members of the community. . . . Similarly, a municipality cannot be held liable for failure to furnish adequate police protection. This duty, like the duty to provide protection against fire, flows only to the general public. . . .

Where, however, a special relationship exists between a municipality and a plaintiff creating a duty, albeit one normally inuring only to the benefit of the public at large, a municipality may be held liable for damages suffered as a consequence of its negligence. For example, a municipality possesses a special duty to provide police protection to an informer who collaborates with the police in the arrest and prosecution of a criminal. . . . Moreover, where a municipality assumes a duty to a particular person or class of persons, it must perform that duty in a nonnegligent manner, notwithstanding that absent its voluntary assumption of that duty, none would have otherwise existed. . . .

It is within this analytical framework that the issue posed on this appeal must be resolved: that is whether the City of New York, through its police department, assumed a particular duty to a special class of persons, not generally true of police control of pedestrian or vehicle traffic, and whether having assumed that duty, the city negligently omitted its performance, resulting in the infliction of physical injury to a member of the benefited class.

In this regard, there is little question that the police department voluntarily assumed a particular duty to supervise school crossings. Its departmental rules and regulations expressly provided that a crossing guard unable to report for duty advise the precinct sufficiently in advance to permit the police to make other arrangements to cover the crossing. . . . Upon notification by a patrolman or superior officer of the absence of a crossing guard from his or her position, the precinct's desk officer was required by departmental regulations to assign a patrolman to cover the crossing. . . . Where more urgent police duty necessitated a patrolman's presence elsewhere, he was required to notify the precinct and the school principal so that the latter could make arrangements to safeguard the children's welfare. . ..

Significantly, the duty assumed by the police department was a limited one: a duty intended to benefit a special class of persons viz., children crossing designated intersections while traveling to and from school at scheduled times. Thus, the duty assumed constituted more than a general duty to provide police protection to the public at large. Having witnessed the regular performance of this special duty for a two-week period, the plaintiff infant's mother relied upon its continued performance. To borrow once more from Chief Judge Cardozo, "(i)f conduct has gone forward to such a stage that in action would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an injury, there exists a relation out of which arises a duty to go forward" (*Moch Co. v. Rensselaer Water Co.*, 247 N.Y. [160, 167 (1928) . . .]). Application of this principle to the present case leads unmistakably to the conclusion that the police department, having assumed a duty to a special class of persons, and

having gone forward with performance of that duty in the past, had an obligation to continue its performance. . . . Had the police department not assumed a duty to supervise school crossings, plaintiff infant's mother would not have permitted her child to travel to and from school alone. The department's failure to perform this duty placed the infant plaintiff in greater danger than he would have been had the duty not been assumed, since the infant's mother would not have had reason to rely on the protection afforded her child and would have been required, in her absence, to arrange for someone to accompany her child to and from school. . . .

[W]hether the police department, having assumed this duty, negligently omitted its performance . . . is a question of fact properly left for determination by the jury. In returning a verdict against defendants, the jury resolved this question against the city.

In passing, we caution, however, that a municipality cannot be held liable solely for its failure to provide adequate public services. The extent of public services afforded by a municipality is, as a practical matter, limited by the resources of the community. Deployment of these resources remains, as it must, a legislative-executive decision which must be made without the benefit of hindsight. . . . Had the city established that a shortage of personnel precluded assignment of a patrolman to cover the intersection of Park Place and Ralph Avenue, notification of this contingency to the school principal or other appropriate action would have been sufficient to relieve the police department and New York City from liability for the failure to supervise the designated school crossing. To place a greater burden upon the police department would be unwarranted.

The order of the Appellate Division should be affirmed, with costs.