

Business Associations I  
Prof. Aviram  
**Simulation 2: Agency**

**Simulation instructions:** Please read the memo and the enclosed case on your own, before class. Then, each of you individually, write down a rough draft or outline response. Do not send me your individual response. Instead, come with this response ready to class, where you will have time to compare it with your teammates' responses, discuss the legal question, and merge your responses into a single response for the entire team. Please e-mail me (aviram@illinois.edu) the team responses, some time within four days of the class in which we hold the simulation. Note that in your response, you should not limit yourself to addressing the analysis in the *Hanson* case, but rather address all issues that seem to come up from what we've studied in class. Also, do not treat the *Hanson* case as a correct statement of the law, but rather as an attempt to apply the law (correctly or incorrectly) in similar but distinguishable circumstances.

Real world note: The *Hanson* case is real, but the memo is fictitious. No real people or events are portrayed in it, nor were any people or animals harmed in the preparation of the memo.

**Memorandum**

**To:** Office of University Counsel, University of Illinois  
**From:** Aaron Archer, Assistant Coach, Fighting Illini Football Program  
**Re:** University Liability for Athletes' Inappropriate Behavior on the Field

I'm writing this memo following up on the phone call the Coach had with your office. Our concern regards any liability the university would have for inappropriate, unauthorized behavior of our football players during a game. In particular we are concerned with after-the-play confrontations between our players and the rival team's that result in a fight. Needless to say, we prohibit our players from any aggressive behavior towards the other team outside of the game itself, and we punish players who act in an unsportsmanlike way. However, every year we have a few cases of players getting into after-the-play fights with players of the other team. Luckily, we haven't had a serious injury resulting from these fights so far, but it could happen.

My wife, who is a law student, thinks this is not a problem for the university and cites a case called *Hanson v. Kynast* [494 N.E.2d 1091 (Ohio, 1986)]. I'm enclosing the case with this memo in case you are not familiar with it. But I'm still concerned, and am not sure whether the fact that the case dealt with a Lacrosse team rather than a football team makes any difference. I was concerned enough to persuade the Coach to talk to you.

We would like your legal analysis as to whether and when it is likely that that the university would be liable for on the field but after the play, unauthorized behavior of our players. We would also appreciate any advice as to how we should act to minimize the risk that the university will be held liable (besides trying to prevent these fights from ever happening, which we are already trying).

**Thanks!**

**HANSON v. KYNAST**, 494 N.E.2d 1091 (Ohio, 1986)

On May 1, 1982, appellee, Brian K. Hanson, sustained a paralyzing injury while playing in a lacrosse game between Ohio State University ("OSU") and Ashland University, Inc. ("Ashland") at the Ashland lacrosse field. During the game Roger Allen, an OSU player, intercepted an Ashland player's pass and scored a goal. As Allen was scoring the goal, he was body-checked from behind by Ashland defender William D. Kynast. Allen fell and Kynast allegedly stood over Allen taunting him. Brian Hanson saw the contact and Kynast's subsequent behavior. Concerned for Allen's welfare, Hanson grabbed Kynast from the side or back and held him in a bear hug. Kynast immediately twisted and threw Hanson off his back. Hanson's head struck the ground and he sustained serious injuries.

The trainers for both teams came onto the field to attend Hanson. After discovering the seriousness of his injury (Hanson was numb and could not move), an assistant trainer for Ashland was sent to telephone the fire department for an ambulance.

Upon arriving on the scene, the ambulance driver discovered that the main entrance to the playing field was blocked by an illegally parked automobile. As a result, the ambulance driver had to find another entrance.

After immobilizing Hanson, the attendants transported him to Ashland Samaritan Hospital where he remained for almost an hour. He was then transferred to Mansfield General Hospital for surgery. The operation took place at approximately 11:00 p.m., more than five hours after he was taken from the first hospital. The surgery successfully relieved vascular compression thus preventing possible brain damage. Hanson, however, had sustained a serious spinal cord injury on impact. It was determined that he had suffered a compression fracture of his sixth vertebra and, as a result, Hanson is now an incomplete quadriplegic.

On December 13, 1983, Brian Hanson filed an amended complaint in the Court of Common Pleas of Ashland County against William Kynast and Ashland University, Inc. Hanson maintained, in relevant part, that because Kynast was acting as the agent of Ashland, the university was therefore liable for Kynast's alleged wrongful acts under the doctrine of *respondeat superior*. Hanson also alleged that Ashland was directly liable for negligently failing to have an ambulance or emergency vehicle present at the site of the game, and in permitting a motor vehicle to be parked in such a manner that the main entrance to the playing field was blocked. Ashland filed a timely answer denying the material allegations of the complaint.

On April 11, 1984, Ashland filed a motion for summary judgment. After obtaining a ninety-day continuance to complete discovery, Hanson filed a brief in opposition to Ashland's motion for summary judgment. Ashland attached documentary evidence to support its position. The trial court granted Ashland's motion on November 16, 1984. The court held that no agency relationship existed between Kynast and Ashland, and that Ashland did not have a legal duty to have an ambulance at the game. In a split decision, the court of appeals reversed the trial court's judgment, holding that genuine issues of fact existed on the question of agency and upon Ashland's duty to provide medical personnel at the game.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

The first issue to be decided is whether the relationship of principal and agent existed between Kynast and Ashland. Because of the absence of proof as to the existence of a principal-agent relationship, the trial court essentially found as a matter of law that Ashland was not bound by Kynast's conduct under the doctrine of *respondeat superior*. We agree.

This court has held that the relationship of principal and agent or master and servant exists only when one party exercises the right of control over the actions of another, and those actions are directed toward the attainment of an objective which the former seeks. Therefore, a principal-agent relationship can be found in the instant case only if Kynast was under the control of Ashland, and if he took some action directed toward the attainment of Ashland's objective.

In order to make this determination we must examine the relevant documentary evidence produced before the trial court. A review of the evidence reveals that William Kynast expressed an interest in Ashland when he was in high school. He requested and received written information from the university and he spoke with Ashland lacrosse coach Dick Fahrney. In his deposition Kynast testified that he chose Ashland because it had a good business school, he could live away from home, and he would be able to play lacrosse. He also testified that no promises were made to him by any Ashland official to induce him to attend the university.

Kynast attended Ashland for three semesters, starting in August 1981. He financed his education through bank loans and with the assistance of his parents. While at Ashland, Kynast decided to play lacrosse; however, he was never obligated to play lacrosse for the university. In addition, Kynast did not receive a scholarship, he used his own equipment while playing, and he was not compensated for his participation.

Lacrosse was instituted at Ashland in an effort to meet the needs of students, especially those coming from the East Coast where lacrosse is a popular sport. Ashland provides a coach and the players are each given a game shirt which displays the university's name. The players also received free transportation to games at other schools, and on one occasion while Kynast played for Ashland, they received overnight lodging on a road trip. No admission fee is charged at the home games.

This court is of the opinion that this relationship between Kynast and Ashland is a relationship common to many students attending universities. A university offers a diversified educational experience which includes classroom instruction in a great variety of subjects as well as optional participation in events such as school clubs, and intramural and intercollegiate sports. All of these offerings are designed to expand and enrich a student's overall educational experience. Students evaluate and determine which university best meets their needs, and then pay a fee to attend that university. The relationship formed under these conditions has previously been characterized as contractual. The student pays a fee and agrees to abide by the university rules. In exchange, the university provides the student with a worthwhile education.

This relationship does not constitute a principal-agent relationship. The student is a buyer of education rather than an agent. Restatement of the Law 2d, Agency (1958) 73, Section 14 J, states that a buyer retains goods primarily for his own benefit, while an agent is one who retains goods primarily for the benefit of the one who delivers those goods. In the instant case, the "goods" to be delivered is an education and the university delivers that education to the student for a fee. It is clear that a student retains the benefit of that education for himself rather than for the university.

Our conclusion that a student is not an agent of a university is supported by *Johnson v. Central Aviation Corp.* (1951), 103 Cal.App.2d 102, 229 P.2d 114. In *Johnson*, defendant Bruce Gross contracted for a course of instruction in the theory and practice of airplane flight from Central Aviation Corp. The plaintiffs suffered damages when Gross, while taxiing a plane for inspection, collided with the plaintiffs' airplane. The plaintiffs sought to hold Central Aviation Corp. liable for the negligent acts of its student, Gross, under the doctrine of *respondeat superior*. The court rejected the plaintiffs' theory holding: "\*\*\* As a student taking instruction he [Gross] was neither the servant nor agent of the flying school while doing those things properly within his course of instruction. \*\*\* "

In summary, the relationship discussed above constitutes a contractual one between the student and his university. The university is selling and the student is buying an education, and the formation of a principal-agent relationship was not intended, nor was one established, between the parties.

The appellee, however, maintains that Kynast's participation in lacrosse converted his status from the usual university-student relationship to that of principal-agent due to the control exercised by the lacrosse coach over Kynast, and because his participation in lacrosse resulted in beneficial publicity for Ashland. We disagree. In applying the law of agency to the facts of this case, we must conclude that Kynast was not controlled by Ashland, and that he was not playing the game for the school's benefit.

The degree of control necessary to establish agency has not been clearly defined. See, *e.g.*, Restatement of the Law 2d, Agency (1958) 485, Section 220. Instead, courts have generally examined various factors in determining whether the requisite amount of control exists. One such factor is whether the individual is performing in the course of the principal's business rather than in some ancillary capacity. In the case at bar, Kynast was not performing in the course of the principal's business, *i.e.*, he was not educating students. On the contrary, he was participating in one of the educationally related opportunities offered by the university. Another factor to be considered is whether the individual was receiving any compensation from the principal. It is undisputed that Kynast was never compensated for playing on the Ashland lacrosse team. A third factor is whether the principal supplied the tools and the place of work in the normal course of the relationship. Kynast supplied his own equipment in order to play lacrosse. The university did, however, provide the playing field.

A review of these factors clearly shows that Kynast was not controlled by Ashland for the purpose of establishing an agency relationship. The control exerted over Kynast by the university, *i.e.*, the Ashland coach running the lacrosse team, was merely incidental to the educational opportunity in which Kynast *voluntarily* participated. A limited amount of control is necessary to assure that each student is afforded a fair opportunity to benefit from the activity. The athletic guidance that was exercised by Ashland in this case does not satisfy the control element required to establish agency.

Further, the documentary evidence considered in determining appellee's motion for summary judgment clearly establishes that Kynast's activity was not directed toward the attainment of an objective by Ashland. Lacrosse at Ashland is not an income-producing sport. In fact, as previously noted, an admission fee is not charged to attend the games. The evidence established that Ashland initiated lacrosse for the benefit of the students wishing to play that game; it is simply one of the many educational opportunities offered to any Ashland student.

The appellee's claim that Ashland derived a benefit through the publicity the team generated is not persuasive. In *Toms v. Delta Savings & Loan Assn.* (1955), 162 Ohio St. 513, 124 N.E.2d 123, paragraph three of the syllabus, this court specifically held that an agency relationship is not established between a savings and loan company and a softball player, even though the savings and loan company sponsored the softball team for publicity and provided the team with uniforms bearing the company's name. See, also, *Rogers v. Allis-Chalmers Mfg. Co.* (1950), 153 Ohio St. 513, 92 N.E.2d 677 (a company-sponsored golf team did not create an agency relationship between the company and the voluntary participants in the activity). In the instant case, there is no evidence that Ashland derived a benefit from publicity; nor is there evidence that Kynast participated in lacrosse so that Ashland could benefit from publicity. Kynast engaged in lacrosse voluntarily, and for *his own* enjoyment. Under such a circumstance no agency relationship is created.

To summarize, we conclude that a student who attends a university of his choice, receives no scholarship or compensation, voluntarily becomes a member of the university lacrosse team that engages in intercollegiate contests with other universities for which games no attendance fee is charged, who purchases his own equipment and who receives instructions from a coach while preparing for and playing such games, but is not otherwise controlled by the coach, and who participates in the game as a part of his total educational experience while attending school, is not the agent of the university at the time he is playing the game of lacrosse. Thus, appellee's claim that Ashland was liable for Kynast's wrongful acts through the doctrine of *respondeat superior* was properly rejected and the trial court properly entered summary judgment for appellant on this issue.

[The court discusses whether the Ashland was negligent for failing to have an ambulance and medical personnel at the game, and for permitting an illegally parked car to block the playing field's entrance. It finds that Ashland was not negligent.]

HOLMES, Justice, concurring.

I fully agree with the majority's conclusions that Ashland University is not liable for Hanson's injuries through the doctrine of *respondeat superior*, and that the trial court otherwise acted appropriately in granting summary judgment for appellant. I write separately to emphasize that, in my view, the majority's reasoning and syllabus relating to the agency issue are much narrower in scope than need be.

An agency relation exists "only if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act." Restatement of the Law 2d, Agency (1958) 82, Section 15. There was simply no evidence that Ashland intended Kynast to have responsibility to act on its behalf, or that Kynast consented so to act. Additionally, "[i]t is the element of continuous subjection to the will of the principal which distinguishes the agent from other fiduciaries and the agency agreement from other agreements." *Id.* at 9, Section 1, Comment *b*. In the case *sub judice*, there was no such continuous subjection of Kynast by Ashland. Although the cases which the majority cites for this proposition all deal with specific actions by one party, which the other party directs or controls, and which also are directed towards the attainment of an objective sought by the latter: *Baird v. Sickler* (1982), 69 Ohio St.2d 652, at 654, 433 N.E.2d 593 (inserting a tube, by a nurse assisting and being supervised by a doctor); *Councell v. Douglas* (1955), 163 Ohio St. 292, 126 N.E.2d 597 (driving the owner's car upon his request); *Bobik v. Indus. Comm.* (1946), 146 Ohio St. 187, at 191-192, 64 N.E.2d 829 (driving a truck at the direction of the procurer of trucking services), the majority does not discuss the actions of Kynast over which Ashland has, or does not have, control, let alone by which the school benefits. While the school may instruct its athletes as to the rules of a game, general game plan and certain plays, it certainly cannot control all of the athletes' movements, such as where, when, and how to run or throw, in the manner a doctor can in assisting a nurse, or a vehicle owner in directing the driver. Ashland clearly had no control over Kynast's actions which resulted in the tragic injuries to Hanson.

This case presents no evidence that any of Kynast's actions were in furtherance of Ashland's objectives. Even if the school would earn money by charging an admission fee to its athletic events, unlike the case at bar, the school would be benefiting itself by its own actions--the school's athletes would not charge the fee. Kynast and other school athletes play for their own entertainment, education and benefit; any benefit to the school by its displaying good talent, winning a game, etc., would merely be collateral. If such incidental benefits did occur, this does not establish a principal-agent relationship between school and athlete where the athlete's actions are not under the school's control and the athletes have not been asked and have not agreed to act on the school's behalf.

An agency relationship is created "if, but only if, there is an understanding between the parties which, as interpreted by the court, creates a fiduciary relation in which the fiduciary is subject to the directions of the one on whose account he acts." Restatement, *supra*, at 9, Section 1, Comment *b*. Such an understanding, like any contract--express or implied--is a product of a meeting of the

minds. Any understanding between a school and prospective or current athletes--even one which, unlike the instant situation, provides inducements such as scholarships, extensive facilities and equipment, etc.--is purely gratuitous in the sense that, generally, either party may end its participation at any time without liability. It seems that, in the typical situation, an athlete could drop out of school or off the team, a school could stop paying for team jerseys or transportation to games, etc., all without legal liability for breach of a nonexistent agreement. Each would be free to act for his or its own benefit and confer benefits on the other without being legally required to continue doing so.

An important question is whether the services of an alleged agent have been performed according to a contract. In situations of student athletes playing for schools, it may generally be found that there is no contractual relationship and, thus, no principal-servant relationship. At least one court has come to the same conclusion by holding that a high school board cannot be liable on a theory of *respondeat superior* for tortious acts of one of its high school basketball team players.

By specifically including so many factual conditions in its syllabus law that a student is not an agent of the university, the majority opinion may give the impression that such facts have a legal significance which they do not actually have. In my view, there would be no principal-agent relationship established between these two parties merely upon the finding of any or all of the following conditions: (1) the student receives a scholarship from, or is recruited by, the university; (2) the university charges an attendance fee for the athletic event; (3) the university purchases equipment and uniforms for the student athletes; and (4) any other gratuitous benefit is conferred on the student by the school. If it would be otherwise, many of Ohio's colleges and universities may be subject to litigation emanating from their sports activities particularly that of football.

In order to state a cause of action against a university for injuries caused by one of its athletes, one must, at the very least, allege negligent supervision, such as allowing a student with a known propensity towards violence to play or allowing a team to play when there is a total absence of management, or the athlete must be paid compensation for his services in such a way as to create a contract between the athlete and university. The pleadings here are not broad enough to include any such allegations, such allegations were not argued before the trial or appellate court, and no evidence was produced from which reasonable minds could conclude that there was a lack of supervision or known dangerous propensities on the part of Kynast. Thus, summary judgment was appropriate.