

## UVA LAW | Mock Class: Business Law and the Law of Agency

GEORGE GEIS: All right. Good morning, everyone. Why don't we go ahead and get started? I am George Geis. And welcome. I'm really happy to be here with you today. I am going to talk today about a topic that many of you have probably never really heard of or never really thought of. It's called the law of agency. And it's a fundamental topic to business law, but it's not a very well-known area of the law.

If you're like me, when I was getting ready for law school, I did a fair amount of research on the internet or picked up a couple of books on the topic of how to do well in law school and how to succeed during your first year. And they all have names like *Law School Confidential* or *Slaying the Law School Dragon* or *1L of a Ride*, something like that. And they do, I think, a pretty good job of talking you through the basics of what it's like to be a first-year student, and they'll tell you a little bit about contract law and criminal law.

But they won't say much about agency law. It's not a topic that generally gets much attention. But nevertheless, it is a fundamental area of the law. It's usually the very first thing that you'll study whenever you're getting into business law. And it used to be actually a required 1L class.

So what is it? What is agency law? Well, you've probably heard of a movie agent or a sports agent. But the truth of the matter is that anyone can have an agent. In fact, I bet some of you might have an agent right now, perhaps without even realizing it. And you might say, well, Professor Geis, so what? Who cares? Well, you should care, in part because agency law says that, under certain circumstances, you may be responsible legally for the acts of somebody else.

I'll say that again. Under certain circumstances, you may be responsible legally for the acts of somebody else. And you say, whoa, hold on, I can barely be responsible for my own acts, and now you're telling me I'm going to be responsible for what other people do? And the answer is yes, maybe. And then you say, well, Professor Geis, how do I know whether I have one of these agency relationship things?

And the answer is that agency is a special relationship in the law that arises from three major requirements. You can have an agency relationship when there's an agreement between the principal and the agent that the agent shall act on behalf of the principal and be subject to his or her control. And when you have those three requirements-- an agreement, acting on behalf of, and subject to his or her control-- then you've got an agency relationship.

So you may say, hey, Professor Geis, here's \$5. Can you go get me a cup of coffee at the law school coffee shop? And if I say yes, we might be in an agency relationship. I've now become your agent. And depending on some additional circumstances, you may or may not be responsible for things that I do while I'm getting you that cup of coffee.

OK, well, why is this important for corporate law? Well, if you think about it, corporations can only act through their agents. Some people will say things like corporations are people, too. And I'm not sure I really know what that means. Corporations are treated as separate legal entities, often, in the eyes of the law, but as a matter of reality, corporations can only act through other people.

They can act through their own agents. And so if you have a company like Facebook, for example, the only way that Facebook can really do anything is if Mark Zuckerberg or Sheryl Sandberg or one of the other agents of Facebook does something on that corporation's behalf. So that's why agency law is usually one of the very first things that you'll study when you're getting into a class on corporations.

OK. Armed with this knowledge, I now want to put you in the position of judge and jury, and ask you to help me decide a few cases. You have all the law right now that you need to know. And while I've handed out one written opinion earlier, I actually want to start with a slightly different case. We'll get to our *Ira Bushey* case in a little bit, but I want to start with another case. And this one is known as *Gorton v Doty*. So let me tell you a little bit about the facts of *Gorton v Doty*, and then I'll invite you to pop in to the class, if you like, and you can give us your thoughts on how this case should be resolved.

So the case involved a teacher in Idaho. Her name was Miss Doty. And one day, Miss Doty was hanging around in the faculty lounge, getting a cup of coffee, when the coach for the football team walked in, and Miss Doty asked the coach, whose name was Coach Garst, do you have all the cars you need to get the players over to the football game this Friday night? I guess they didn't take a bus at that moment in time. They would all drive together in cars over to the away games.

And the coach said, no, actually we could use one more car. We're a little bit short on having enough transportation to get all the players down to the game. And Miss Doty said, OK, I tell you what. I'll let you use my car to take some players to the game, but I don't want a teenager to drive it. So I'll only give you my car and let you use it if you're the one that drives the car. And the coach says, OK, great, thank you. I will do it.

Took the car. Went to the game. We don't know if they won or lost the football game, but on the way home, the coach was driving her car and he got into an automobile accident. And one of the football players, Gorton, was injured in the accident.

And let's just assume, for the purposes of this case, that the coach was driving negligently, the coach committed a legal wrong by not driving appropriately. Maybe he was so upset by the loss or so excited by the win that he wasn't being careful in the way that he drove, and got into the accident and Gorton was injured.

Now, put your plaintiffs lawyers hats on for a minute and think about, under circumstances like this, who might you try to sue if you're Gorton or if you're Gorton's family? You've had some medical bills. You don't want to pay for those medical bills yourself. You've been wronged.

Many of us, I think, would start by considering the possibility of suing the coach. Coach was the one perhaps that drove negligently. Let's try to go after the coach. The problem was that this was a pretty significant accident and the coach was killed. And apparently, the coach and the coach's estate didn't have funds to cover the medical bills.

So another possible defendant might be the school. The school, after all, was involved in some level in sponsoring this game or sponsoring the event. But there was a strange rule in place under the time of the case that prevented the school from being a defendant, some of an immunity statute that's rare these days.

So instead, Gorton decided that Gorton was going to try to sue Miss Doty. Gorton was going to try to go after Miss Doty and recover from Miss Doty for the medical harms. And the case really turned on the outcome of whether Miss Doty was viewed as a principal and Coach Garst was viewed as an agent of Miss Doty.

So here, again, are the elements. There has to be an agreement that the agent is going to act on behalf of and be subject to the control of the principal. And if so, you've got an agency relationship. And if so, then perhaps Miss Doty would be responsible for the wrongs of Coach Garst.

So I want to invite any of you that want to comment on this case. I mean, the question, right, is is this an agency relationship. If you're interested or if you have thoughts, go ahead and please share your screen. You can also comment on the chat if you have any thoughts, as well, but I'd like to invite a couple of you to share your thoughts. Do you think that Miss Doty should be liable for Coach Garst's negligent driving? Any thoughts from those of you in the class?

All right, we have someone, I think, who's popping in. Let me see if I can share his screen. William, welcome.

**WILLIAM:** Thank you.

**GEORGE GEIS:** What do you think?

**WILLIAM:** To answer your question, I'd say yes.

**GEORGE GEIS:** OK. How come?

**WILLIAM:** It has all the markings-- it has all the markings of an agency relationship since, number one, there was an agreement. He agreed to drive her car. He specifically agreed that there would be no 17-year-olds driving her car. So that's also kind of a sub-agreement beneath that. He's acting on her behalf. And he did follow what she said.

**GEORGE GEIS:** OK.

**WILLIAM:** So I would say [INAUDIBLE]

**GEORGE GEIS:** So clearly there was agreement, right? There was some type of an agreement. Do you think that there is enough evidence that the coach was acting subject to her control? Or how would we know that he was acting subject to her control?

**WILLIAM:** Well, I think just the very act of driving the car would be subject her control just since it could be considered a deadly weapon. And at the same time, I think it makes it slightly easier considering that he followed what she asked him to do. He wasn't in the passenger seat and drinking a beer, as far as we know.

**GEORGE GEIS:** She conditioned the use of the car on his willingness to follow her direction that he be the one who drives. So you know, it wasn't as if she told him exactly what route to go, but she clearly did put a condition on his use of the car, and that might indicate that there was some type of control that she had. Now, let me ask you about this other element, acting on behalf of. Was the coach acting on her behalf?

**WILLIAM:** I mean, essentially, since she could have-- given the fact that there was this agreement, she just as easily could have been the one driving. And she could just as easily have been the one in the accident, and then she would have been just as liable.

**GEORGE GEIS:** OK. So maybe by virtue of the fact that she didn't have to drive the car, we should understand that he was acting on her behalf or he was conveying some sort of a benefit for her. Let me see if there's any other thoughts. Anyone else want to jump in? Go ahead and share your audio and video if you have other thoughts on the case, and whether this should give rise to an agency relationship.

No one else has jumped in, so don't be shy. But the court actually-- OK, here we do have somebody coming in. Benjamin, I think.

**BENJAMIN:** Hi.

**GEORGE GEIS:** Benjamin, how are you doing?

**BENJAMIN:** I'm doing well, how are you? I'd say that he is not her agent because she gave him a car for his use. She supplied him with a car. She didn't look to hire him for a job. If she didn't give him a car, he would have gone to get from someone else. So he was a principal looking for a tool to do a job, and not she was looking to hire someone to do a job she couldn't do herself.

**GEORGE GEIS:** OK. Do you feel like she got a benefit or there was some reason why we should understand the coach is acting on her behalf?

**BENJAMIN:** I think she-- the benefit of her being a good citizen or being a helpful colleague, but she wasn't looking to hire a driver for the team. He was looking to hire a driver for the team.

**GEORGE GEIS:** Yeah, it seems like, if anything, it might be flipped, where he was the one that was receiving a benefit because he got to be able to use the car to get the football players down to the game. Now, in the end, the court actually agreed with William, and it said, yes, I do think that there is an agency relationship here.

The case was a little bit puzzling, I think, for the reasons I just said. It's not 100% clear that she was the one that was getting the benefit or that he was acting on her behalf. Maybe there's some of a school spirit benefit that she was doing by helping out the school. But I think the case was viewed as a little bit of a puzzle.

Nevertheless, I'm going to excuse you guys for the moment. Nevertheless, I think it was a situation where we can see just how important this agency relationship status can be because I don't think she would have expected that she would be responsible for his negligent driving. But nevertheless, the court said there is an agency relationship, and therefore, we are going to hold her responsible.

All right, let's try a couple of more hypotheticals. And I want to invite all of you who are here-- I see there's about 23 or 24 folks, so all of you that are here, I'd like to invite you to participate. No need to pop in, but if you have access to the chat, I'm going to ask for just a yes or no reply in the chat, and you can tell us what you think about this hypothetical.

So let's imagine that I come up to you and I say, how are you doing, here's my pen. And you take my pen. Have you become my agent? Tell me what you think in the chat, yes or no, have you become my agent.

I'm seeing a lot of no's, a lot of no's. Yeah, those of you saying no, you're right. We don't have the elements. All I've done is give you my pen. I haven't asked you to do anything with it. I haven't created anything else. We are in probably what would be understood as a donor/donee relationship. And we'd maybe want to know a little bit more about whether you get to keep it or whether you've got to give it back to me, but it's not enough that we're going to meet the three elements necessary for an agency relationship.

Let's try once more. Here's my pen. Can you sell it for me? And you say, sure, I'll do it. Are we in an agency relationship? Tell us what you think, yes or no.

All right, lots of yeses are coming through, a few no's. Probably the answer's yes, but it might depend on whether or not I've got enough control over the situation. I'm generally telling you what to do, sell my pen for me, so probably that's enough control to give rise to an agency relationship, but we might want to know a little bit more about that control element in order to really figure this one out.

OK, last one. You buy my pen for fair value, and you're looking to-- say \$5, whatever it's worth-- and you're looking to resell it. You're in the business of pen resale profiteering, and you're going to try to buy my pen for \$5 and then resell it yourself for a profit. Are you my agent? Yes or no.

Yeah, most of you are saying no. We're not in an agency relationship, right? You're not doing anything for my benefit. We're in a distribution relationship or a contractual relationship. We've made a contract, and you've now bought my pen. And if you can get more for it, great for you, if you can't get more for it, too bad for you. But you're not acting on my behalf. You're not doing anything, necessarily, for me. OK, great. Thanks for your engagement.

Let's step back a little bit and talk more generally about this overall area of agency law. We've been talking so far about the creation of an agency relationship, and how you know whether you've got one of these or not. Once you've got an agency relationship, it's also important to understand what the consequences are. What does it mean for your relationship with each other, and also with a third party? Because oftentimes, agency law will involve some sort of a third-party participant.

There are a number of implications. You can take an entire class, if you like, in this area. Some of the most important ones, though, are that the agent can bind the principal to others in contract law. Again, think back to my Facebook example. This is why corporations often want to have agents, is because those agents can enter into contracts on behalf of the corporation.

Second consequence, the principal may be responsible for the torts of the agent, or the legal wrongs of the agent. We saw an example of this already right with *Gorton v Doty*. Miss Doty was responsible for the bad actions of her agent, Coach Garst. Finally, the agent is going to owe fiduciary duties to the principal. So this is not just a normal relationship or a contractual relationship. It's a special relationship or a fiduciary relationship in the eyes of the law.

And what that means is that the agent has to be diligent. They have to be careful. They have to be loyal to the principal in the way that they carry out all of their various activities. This is actually really important for corporate law, and a lot of the obligations of corporate officers and board of directors and various folks within the corporate ecosystem flow from duties that were created initially in agency law. And again, that's why this is one of the main starting points for this area of legal studies.

All right, I'm going to skip over implication number one and not worry as much about contract law. And I want to move into a couple more cases involving consequence number two, situations where the principal might be responsible for the torts or the legal wrongs of the agent. But first, let me give you just a little more law so that you can be an informed judge and jury.

We're going to be working with a theory called respondeat superior. There are a few different theories in this area, but one of the big ones is known as respondeat superior. It basically means let the employer answer for the torts of the employee. And in order to have respondeat superior, there are two additional requirements.

First off, the agent has to be an employee and not just an independent contractor. In other words, it has to be a fairly close agency relationship, not a distant agency relationship. And second, the tort or the wrong has to be committed within the scope of employment. Now, the case we'll get to in a minute will flesh that out a little bit, but in general, this has traditionally been understood as the problem arose out of a purpose to serve the employer. The agent was trying to serve the employer or carry out their agency responsibilities, and while doing so, they incurred some of a legal wrong, or they did something problematic.

Kind of a classic example that's given in some of the legal books talking about the development of this doctrine is you've got a gardener that's working in your home as an employee, and there's some people that are trespassing on your flower bed, and the gardener picks up a stick and throws the stick at the trespassers. You might be responsible for that under this doctrine of respondeat superior. The tort was committed within the scope of employment because they were trying to protect your garden and get rid of the interlopers.

I'll say a little bit more about the first element. So we need an employee relationship, not an independent contractor relationship. And I won't go through everything here. Here are some factors I'll just put up there so you can kind see the various factors that are often important when we're making this distinction.

So this may be familiar to some of you already at some level, right? I mean, you might already be aware of the difference between an employee and more of an independent contractor. Employee relationships are going to be subject to greater control by the principal, by the supervisor. If you want a mental model for the difference here, you might think about, coming back to the gardener example, two different types of gardeners.

On the one hand, we might imagine a gardener that comes by every couple of weeks, mows and goes. That's more likely to be an independent contractor. They're bringing all their own equipment. They're not really following careful control or really being supervised by the homeowner.

On the other hand, we might think of a gardener on some show like *Downton Abbey* or one of those royalty shows that lives in a shed in the back of the property. All the equipment is owned by the homeowner. Every morning, they get up and they say, well, what do you want me to do today? Should I prune the roses? Should I cut the hedges? Well, why don't you cut the hedges today. That's more like an employee type relationship, a closer agency relationship.

All right, now we're ready to take on our next case and apply this doctrine of respondeat superior to ~~the~~ *Bushey versus US* case. This is the one that I handed out, so some of you might have had an opportunity to read it. But even if you haven't had a chance to read the case yet, I think we can summarize it pretty quickly in a way that will allow you to hopefully follow along.

I guess at the outset, we really should acknowledge that some of the terminology, and especially some of the language related to gender, is a little bit outdated. I mean, this is a 50-year-old case, and some of the terminology of the court hasn't aged very well. Nowadays, we wouldn't be talking about reasonable men or working men, we'd be talking about reasonable people.

But I do think it's a notable case. It's notable for the facts that it sets up. It's notable for its approach to the law. It's also notable, at some level, for its jurisprudential development, for the way that it makes changes to the law and talks about how the law should necessarily evolve through common law reasoning. So I think this case has a lot going for it, even if I wish the terminology was a little more updated. Let me talk quickly about what's going on, and then, again, I'm going to invite some of you to help decide whether or not this case was properly adjudicated.

So here's the basic story. There was a Coast Guard ship that had been brought in to Brookland, and it was sitting in dry dock getting retrofitted. Now, while the ship was getting retrofitted, the sailors were still living on the ship. And they had set up some system where the sailors were going to be able to exit the ship and go off through the dry dock and take shore leave while they were repairing the ship. So the sailors were living on the ship during this maintenance period in the dry dock.

One of the sailors, named Lane, went off and took some shore leave and got drunk. Apparently, Lane got really, really drunk, came back to the ship late at night, walked along the gangway, where Lane was supposed to go back to his bunk, and Lane decided to spin a set of valves in the dry dock 30 times. Three valves, 30 times. And it turned out that those valves control the water intake to the dry dock. And shortly thereafter, the dry dock filled up with water, the ship toppled over, and the dry dock was damaged.

Now, fortunately no one was really hurt, but Ira Bushey, the dry dock owner, was notably upset, understandably upset. And Bushey said, well, I'd like someone to pay for this harm. Lane had sort of disappeared. I don't think Lane had a lot of money to pay for this harm anyway. So instead, Bushey said I'd like to try to recover for Lane's tort from the Coast Guard. And the legal theory turned, again, on whether or not respondeat superior liability would attach to the Coast Guard. Should the Coast Guard answer for the torts or the wrongs of Lane?

And again, there were two major issues to resolve under this respondeat superior liability standard. Was Lane an employee or an independent contractor? And second, was Lane acting within the scope of his employment during this incident?

Let me invite a few of you to, again, share your video, share your screen. And let's see if we can talk this one through. So go ahead and please volunteer if you're interested in discussing the case, and we can try to see what happened and see if the court actually got it right, and talk a little bit more about why that might or might not be the case.

All right, great, we've got one volunteer. And go ahead, if you're interested in participating, please don't hesitate. Jump in, as well. Vincent, welcome.

**VINCENT:** Hi.

**GEORGE GEIS:** Let me ask you first about element number one. Do you think that Lane was an employee or was an agency?

**VINCENT:** I think--

**GEORGE GEIS:** Sorry, an independent contractor.

**VINCENT:** I think Lane was very clearly an employee, both based on, one, the government providing equipment, like Lane didn't bring his own boat to do Coast Guarding. Two, the fact that, judging by the term seaman, I'm assuming he was enlisted in the Coast Guard, which--

**GEORGE GEIS:** I think he was.

**VINCENT:** --was, again, far more in the scope of employment than independent contracting.

**GEORGE GEIS:** All right, so in your view, it looked like he was more of an employee, less of an independent contractor. So Vincent, I think I'm with you. I mean, my guess is that this is the perfect example of an employee type relationship. I'll bet that Lane didn't feel like he had a lot of responsibility every day in deciding whether or not he was going to work on this part of the ship or that part of the ship. He was probably being directed very much what to do, and told what to do.

So the next question, I suppose, is whether or not this wrong occurred in the scope of employment, was related to the employment of Lane. Before I ask you, Vincent, for your thoughts, let me ask, again, those of you in the chat to give us a quick vote. Within the scope of employment, yes or no? What do you think? Is this activity within the scope of employment?

I'm seeing some pretty split opinions. I'm seeing some yeses, I'm seeing some no's. Again, those of you that just voted in the chat, if you want to come in video, please don't hesitate. It'd be great to have you, as well. But Vincent, since you're here, let me ask for your opinion. Was Lane acting within the scope of employment during this incident?

**VINCENT:** I would argue yes, for a few reasons. The first is, in his role as a coastguardsman, there is no defined off period when you're on a boat. So like, you can not have any listed responsibilities, but you still have responsibilities if the ship starts to sink or gets shot at.

So one, like, there are no off hours. Two, the job of maintaining a boat while in dry dock involves turning valves, moving things, cleaning things. And even though he was obviously drunk and made an error of judgment in turning the valves, that is still a thing that reasonably he would have done while-- not he would have done at that time while sober, but he would have done similar mechanical activities on and around the boat while sober.

**GEORGE GEIS:** So do you think that, when Lane was coming back from shore leave, he was thinking, all right, what I really need to do now before I go to bed is to help out my employer, make sure that the Coast Guard has things go properly with their ship, and the right way for me to do that is to spin these three valves 30 times? In other words, was he attempting to serve the employer?

**VINCENT:** I would argue yes, although he clearly did not by doing it. But I think that was his mindset.

**GEORGE GEIS:** It's a little hard to know what he was thinking, right? I'm not sure that he even knew what he was thinking. But it does relate a little bit, I guess, to what we might think his obligations were. I don't know, again, if he was the one turning valves or if the valves were more the responsibility of the dry dock, but it's not impossible to imagine that sailors would sometimes, in the course of their duty, be turning various valves.

Now, the court actually didn't use this purpose to serve test. It recognized that there was this test that was commonly used to determine if something had happened within the scope of employment, but it didn't use this purpose to serve test. Instead, it used an alternative test known as foreseeability. Was it foreseeable that something like this would happen? And we get a quote on the second part of the opinion, it says, "here was foreseeable the crew members crossing the dry dock might do damage." Vincent, is it foreseeable that something like this would ever happen?

**VINCENT:** I would say yes, given that dry dock incidents happen all the time--

**GEORGE GEIS:** How many times do you think this has happened before and since?

**VINCENT:** I know Russia messed up its aircraft carrier because it sunk a floating dry dock because the sailor lit something on fire accidentally.

**GEORGE GEIS:** All right, so maybe it occurs from time to time. I'm not sure that, prior to being aware of this case, I would have thought that it was foreseeable that we would have expected this sort of thing to happen. But the judge actually goes back a little bit, doesn't he, in the level of abstraction, and say it might not be foreseeable that this specific thing would happen, but it's foreseeable that some problem like this could thereby occur. And so I think that's what's, in part, motivating the judge. All right, let me let you off the hook for a minute. Thanks very much for your participation.

One of the other important questions, I think, relating to this case-- so the court, of course, at the end of the day said, yes, actually I do think that the government's going to be responsible, the Coast Guard is going to be responsible. They're going to be liable for the problems here. And the theory that Judge Friendly used was a little bit different than the traditional theory, as we just said. One of the other things I think is important for the case and that's motivating the outcome of the case relates to the policy implications of the case.

So I want to ask-- again, if there's any volunteers, that'd be great, if anyone wants to just comment on the chat, that's fine, as well-- what do we think the results of this decision are going to be on actors going forward? In other words, do we expect that parties are going to modify their behavior, modify the way that they carry out their activities in response to the imposition of liability in this case? And if anything, what does that say about whether this case was properly decided? I mean, do we think that this result leads to the right incentives for society, or do we feel like maybe an alternative result would be better? Anyone want to share their thoughts on that question? Great.

**KELSANG:** Hello.

**GEORGE GEIS:** Hi. How are you? Is it Kelsang?

**KELSANG:** Yeah, perfect.

**GEORGE GEIS:** Welcome.

**KELSANG:** I would say, in the long run, this places the burden on safety towards the employers.

**GEORGE GEIS:** OK.

**KELSANG:** It makes more sense because then the employer obviously has more money, typically, I would think, like a corporation, than an individual person. And ultimately, I think that would be better for public policy.

**GEORGE GEIS:** OK, so one of the things we might like to have happen is to put incentives in place that are going to reduce the possibility that an accident like this happens in the future. Now, it may not be this exact accident, but something similar. So I think that's a great avenue of discussion. I guess I'd ask you, question one, is there anything that the Coast Guard could have done to have prevented this sort of problem from occurring?

**KELSANG:** I guess they could have been more choosy when it comes to hiring people, because it seems like--

[INTERPOSING VOICES]

Yeah.

**GEORGE GEIS:** Maybe be more careful with who it is that you choose to hire. You know, Seaman Lane might not have been the best person to bring on. Anything else you can think of that they could have done?

**KELSANG:** Well, I know they could have instituted better policies for their employees, because I remember I took like a bartending class once, and I'm pretty sure there's like an agency kind of requirement there, where a bartender, or like the employer of the bartender is responsible if a bartender gives too much alcohol to one person and the person drives off and gets into an accident. Because of that, bartenders are held to super high standards, and they try not-- that's why a lot of bartenders won't give extra alcohol to someone who is extremely inebriated.

**GEORGE GEIS:** Yeah. I think that's exactly right. I mean, maybe we could have better training, right, or better controls over what it is that they're doing. I'm seeing a couple of helpful comments in the chat. Caitlin says, why don't we just discourage drinking, right? Even on shore leave, we could have a greater level of punishment by the Coast Guard that might discourage this behavior from taking place. Or Michael says, look, why don't we try to figure out a way to acknowledge that he had a problem coming into the ship, there was a guard there, and if you see someone like this, train the other sailors to escort him over to his bunk so that he doesn't do something stupid on the way through.

Kelsang, one other consideration we should ask, however, is whether or not there's anything Ira Bushey might have been able to do to prevent this problem from occurring. Because if Ira Bushey is the party that could conceivably take the easier precautions, maybe they should be the one that should be responsible for the damages, and will give them incentives to do better next time around.

**KELSANG:** Well, I'm not sure what to say because they hired the US government to handle their ship. And I don't know anyone who would be-- or the Coast Guard-- I don't know who'd be more reliable to handle ships than the Coast Guard.

**GEORGE GEIS:** OK, so you could say, well, the Coast Guard was in. Now, the dry dock owner, though, controlled the property around the dry dock, including the valves that the seaman turned.

**KELSANG:** Yeah, I don't know.

**GEORGE GEIS:** Yeah. Abby's got an idea. Abby says, why don't we put locks on the valves, right? Who's in a better position to put locks on valves, the dry dock owner who owns the valves or the Coast Guard? And so there is, I think, a little bit of an argument that might say, well, do we really want a test this broad, because maybe it means that then Ira Bushey and the various dry dock owners of the world might not take precautions that they would otherwise be interested in taking in order to minimize the damages.

Now, the judge actually has a pretty interesting footnote in this case that says, you know what, it may be, even if the case comes out the way that it does, the Coast Guard would encourage dry dock owners to put locks on the dry dock valves because they know that they're going to be responsible under the outcome of this case. So it's a little bit of an interesting question, and I think it comes down to what's going to be the easier and more likely result that's going to lead to that. But at the end of the day, the court here-- Kelsang, thank you, I'll let you go-- at the end of the day, the court here says we are going to hold the Coast Guard responsible.

It's interesting, I guess, also to note how the two courts, the lower court and the appellate court, differed in the result that they reached, because they both agreed that the Coast Guard should be responsible, but from a jurisprudential manner, they did it in a slightly different way. And I just want to kind of call your attention to that in the case. In the lower court opinion, the trial court said, I am going to totally reconsider the policy behind this rule, and I don't think the policy makes much sense anymore, and therefore we're going to jettison the rule and hold employers responsible. They've got perhaps deeper pockets, they're going to be on the hook for these types of problems.

And the appellate court Judge Friendly said, can't do that. We've got to follow precedent. There's some precedent here limiting the liability of principals under these types of situations. But Friendly then went on to adopt a slightly different test. I think Friendly felt like it wasn't going to be very easy to say Lane had a purpose to serve or was trying to serve the employer during the valve turning. So Friendly changed the test. He said it was foreseeable, and he took sort of a broad approach to the foreseeability test, and basically reached the same outcome by changing the legal standard that was going to be used in a way that wasn't entirely inconsistent with precedent, it was just much more of a secondary or a lesser used approach to evaluating this scope of employment.

OK, we've got a few minutes left. I want to ask one other question. Just because the case came out this way doesn't necessarily mean the law is right. So we have a standard that says, under certain circumstances, you might be legally responsible for the acts of your agent. But it doesn't mean that the law has to be that way. And a lot of what you'll do in law school is try to evaluate the law once you've figured out what it currently is.

So I want to just explore whether or not it's possible that the law in this specific area might be wrong. And we might take it on this way. Let's imagine that I own a fireworks store. I own a chain of Geis' Fireworks. And there are three possible legal regimes, or three possible worlds that we could live in.

Here's world number one. We have a world where the principal is never liable for the torts of her agent. The principal is never going to be liable for the torts of the agent. If the agent commits a tort, let the agent pay for the damage, but the principal is never going to be liable. So in the fireworks context, I'm never going to be liable for any torts of the employees within my fireworks empire.

Let me invite anybody who wants to comment on whether they'd like to live in that world or not to go ahead and pop up on the screen or to share your audio and video. Is this a world you'd like to live in, where the principal is never liable for the torts of her agent? How is that going to incentivize me to behave? How is that going to incentivize the store to behave? Any thoughts or comments?

**CAITLIN:** Hi, yeah.

**GEORGE GEIS:** Hi. Welcome.

**CAITLIN:** I think that, for an employee standpoint, it would be a very bad world to live in because I think people would be less likely to take jobs with more risks if they feel like they're going to be liable.

**GEORGE GEIS:** OK.

**CAITLIN:** And it's going to be hard for employees lower down to be able to pay for whatever damages might happen. So I think it doesn't fully make sense because, if something does happen and the employee is held liable and they don't have the funds to pay, then what happens?

**GEORGE GEIS:** So there are at least two different parties that might be affected, maybe three if you consider my incentives. From the employee standpoint, I'm not sure it's going to make a huge difference because if the employee does something stupid, they're going to be liable anyway under our current regime, right? I mean, so either way, I think the employee is going to be responsible. Maybe it might be a matter of is there going to be enough to recover.

Let me ask it this way. Would you like to shop in a store like this, under a world where the principal is never liable for the torts of her agent?

**CAITLIN:** No, because you can't be assured that you're going to be reimbursed [INAUDIBLE]

**GEORGE GEIS:** You might worry about the possibility of getting reimbursed if something really bad happens, because maybe the employees aren't going to have deep enough pockets. That's possible. You might also worry about the rules that I'm going to put in place in a system like this. Go ahead, smoke on the job if you want. Right? Who needs fire extinguishers? It's never going to come back to haunt me. And in a world like that, I do think that we might not feel that there are going to be great incentives in place.

Caitlin, what about this world? The principal is always liable for torts committed by her agent, no matter what. Any torts that an agent ever does once you have an agency relationship, you're going to be responsible for it. Is that a good legal rule?

**CAITLIN:** I think it can cause issues in the sense that there will be less incentives to, like, grow your company and to be efficient, and there might be too many rules and regulations put in place. But, like, that's not necessarily always a bad thing, either.

**GEORGE GEIS:** Yeah, I might worry a little bit about that. I mean, if we want to promote expansion of at least some commercial endeavors and sort of help grow the economy, a rule like that might make some of us a little nervous, right, because just because you happen to hire an employee, it's not obvious, right, or it might make you nervous if everything they ever do down the road is going to be something that you might then be responsible for yourself.

So the law attempts to sort of impose this middle ground. We're going to try to set up a general compromise. The principal is going to be liable for torts of the employees, but only if they're acting within the scope of the duty and if they're acting within their agency relationship, trying to either fulfill the purpose of their role or to serve the employer, or maybe if their bad behavior was foreseeable. But the goal, of course, is to say, we want to try to hold employers-- principals-- accountable for some of the wrongs that happen in relationship to the business endeavor, but not everything so that they won't be chilled from, in certain circumstances, hiring various types of employees to try to grow their endeavor. I'll let you go. Thank you.

So at the end of the day, I think what we can say is that legal treatment in this area turns on some real subtle distinctions. I mean, think about the various elements we've talked about both to establish an agency relationship and also to establish liability for the principal in our respondeat superior case. These subtle distinctions might seem funny to you now. Why should they matter? And these are the types of things that can drive non-lawyers crazy, right? We're trying to draw some lines between one type of legal treatment and another. But it matters.

And this, in part, is how you're going to be spending much of your next year in law school, learning about what really matters and then arguing whether or not it should. That's a second important part of your legal education, because the law is not static. We see in the *Ira Bushey* case that it's changed. And a lot of what you're going to be doing is not only understanding what the law currently is, but having a robust discussion about whether it's optimized or whether we should consider making some changes along the lines of what we've just done with this fireworks store regime.

All right, well, we've run out of time. Thank you so much for joining me today, and I really hope that I'll see you here in the fall. I can't wait to get back in the classroom, and I hope to see many of you in person in the fall. I'll go ahead and stick around for a few minutes in case you have any questions about these cases or these classes. Otherwise, thanks again for joining. I'll let you go. And be sure to join our next session coming up at about 11:30. Thanks, everyone.